United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-2026

United States Court of Appeals

For the Second Circuit.

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THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MILTON COHEN, BERNARD DEUTSCH and STANLEY DUBOFF,

Defendants-Appellants.

On Appeal From The United States District Court for The Southern District of New York

JOINT APPENDIX
(Vol. II — Pages 887-1724)

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AFTERNOON SESSION

2:05 p.m.

(In open court; jury present.)

G E R A L D O ' M E A R A, resumed.

THE COURT: You may proceed, Mr. Block.

CROSS-EXAMINATION CONTINUED

BY MR. BLOCK:

Q Mr. O'Meara, do you recall that there was some kind of a question in accounting circles that arose during 1969 and 1970 with the way in which to report for public companies income derived from the sale of franchises and from franchise operations?

A Yes.

Q Did you ever hear anything about that?

A Yes. That was quite newsworthy at the time.

Q You say it was newsworthy at the time?

A Yes. When franchisees --

Q You have answered the question, if you don't mind.

A All right.

THE COURT: When was that?

THE WITNESS: I don't recall specifically. I think it was 1970 or later.

Q 1970 or later?

A Yes.

Q It could, however, have been sometime in the latter part of '69, isn't that right?

A I don't think so.

Q You don't think so?

A No.

Q In other words, this was an unresolved matter as far as accountants were concerned, isn't that correct, for awhile?

A No, I don't think it was unresolved. It was just a customary practice that franchisees paid franchisors a fee merely for getting a franchise. And they were able to take that into current income.

The whole accounting fraternity then as their system goes made a rule that they thought this was unjustified and the earnings should be spread out over the term of the franchise. So that the amount of earnings immediately to be claimed from those franchisees was greatly reduced.

And, as such, the market took quite a dim view of the earnings of franchises and the market had quite a drop in price, because particularly, beginning companies were dependent largely on this form of current earnings, because their earnings subsequently had to be reduced

drastically the price of the stock fell accordingly, since prices of stocks normally related to earnings.

Q That related to the fee for the sale of franchises, isn't that so?

A Yes.

Q Wasn't there another aspect of it which was concerned with anticipated income derived from royalties and payments by the franchisee? Are you familiar with that?

A No, I don't recall that.

Q This is the only aspect of the accounting problem that you recall at the moment, is that correct?

A The fee problem.

Q You are not an accountant, are you?

A No.

Q And you don't know how long it had taken for the accounting fraternity to reach this conclusion, do you?

A No.

Q You have testified here that you had a number of conversations with Mr. Cohen.

A Yes.

Q In which you asked him for the 1969 annual report?

A Yes.

Q That is what I am asking you about.

A Yes.

Q How late into 1970 would you say you were asking Mr. Cohen for the 1969 annual report? Can you recall it?

A Not specifically. But I don't recall ever receiving it, so I probably called him every three or four months or so, or asked him specifically about that.

Q In other words, would it be fair to say that starting in late '69, that would be around November or December '69, you had a first conversation with him and you had another conversation with him, say, around March of 1970, and another conversation with him maybe in June of '70, and then another conversation thereafter? Is that what you are saying?

A Something like that, yes.

Q Something like that.

Did Mr. Cohen in any of these conversations tell you that one of the things that was holding up the issuance of the annual report was the uncertainty about how the accountants were going to treat the income from the sale of franchises? Did he ever say that in any of the conversations?

A Possibly. I don't recall offhand.

Q '68, '69, '70, concept companies were in fact widely accepted and Wall Street acted on the basis of it?

A Yes, very much so.

Q And your decision encouraging Value Line's purchase of these private shares was based in large amount, was it not, on the fact that you were investing in a concept company?

A Yes.

Q As were other individuals and other houses and other lines?

A Yes, including the Value Line and my own idea. Combustion Equipment was in pollution control, which at that time was very much the same thing, and also worked out very well.

Q As a result, because of this flow of enthusiasm about concept companies, it was true, was it not, that you were dealing with companies that didn't have a big performance background?

A Yes.

Q And, as such, earnings were not exactly extremely important for you in making your determination?

A That is true.

Q You made a determination, did you not, when Value Line went into this private placement on the basis

'74

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1 rmmch O'Meara-recross
Rich-direct

Q If you didn't get enough information, you would have made an inquiry?

A Yes.

Q You didn't make an inquiry here because you never saw that, you say?

A Yes.

MR. BLOCK: I have no further questions.

THE COURT: Thank you, Mr. Block.

Mr. Segal?

MR. SEGAL: No questions, your Honor.

MR. ROBSON: No questions, your Honor.

MR. FEFFER: I have no redirect, your Honor.

THE COURT: You are excused, sir. Thank you very much.

THE WITNESS: I would just like to say I have enjoyed myself.

THE COURT: You are the first witness who has made that comment.

(Witness excused.)

MR. FEFFER: The Government calls Kenneth Rich, your Honor.

K E N N E T H R I C H, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FEFFER:

Q Mr. Rich, how are you presently employed?

A As a registered representative of Loeb, Rhoades & Company.

Q I am going to direct your attention back to 1967 through approximately 1970.

How were you employed then?

A As a partner -- as a registered representative and then a partner of Jaffee & Company.

Q Do you know a Mr. Duboff?

A Yes, I do.

Q Do you see him in the courtroom?

MR. ROBSON: Conceded.

Q Do you know Mr. Deutsch?

A Yes.

Q Do you see him in the courtroom?

A Yes.

MR. SEGAL: Conceded.

THE COURT: It is conceded the witness knows both gentlemen.

Q Did these two men work with you in Jaffee when they first came there?

A Yes.

Q Do you know when?

A End of '66, beginning of '67; something around that area.

THE COURT: Were you there already?

THE WITNESS: Yes, I was.

Q I want to show you what has been marked as 50-A-1 for identification and 50-A-2 for identification, and I would like you to first identify, if you can, 50-A-1 for identification.

A 50-A-1 is an order ticket for the purchase of 5,000 shares of Richard Packing at $28-1/2.

Q And 50-A-2?

A That would be the confirmation coming out of Loeb, Rhoades for that transaction.

Q I want to direct your attention on 50-A-2 to a portion marked "Account Number." Do you see that?

A Yes.

Q The number 561 appears there.

Do you see that?

A Yes.

Q What is the number 561?

A That was the registered rep number for Deutsch and Duboff.

Q Can you explained what a registered representative

number is?

A We call those the front numbers and each registered rep had his own front numbers.

Q Did they have individual numbers or did they share that number?

A Deutsch and Duboff?

Q Yes.

A They shared the number.

Q Were commissions paid to that account, the 561 account?

A Well, they would be paid to Deutsch and Duboff on the 561 account.

Q Do you know what was done with those commissions when they were received?

MR. SEGAL: Objection.

Q If you know, from your own personal knowledge.

THE COURT: Overruled.

A I don't understand.

Q Do you know what physically was done with the commissions by Mr. Deutsch and Mr. Duboff? Were they split up in any fashion?

A Yes.

Q If you know.

MR. SEGAL: Objection.

A Yes.

MR. SEGAL: I would ask that be stricken unless the witness can explain how he knows.

THE COURT: That is for cross-examination, sir.

Q When you say "split up," do you mean split in half?

A Yes.

Q What is the basis of the knowledge, or the basis of your knowledge as to these commissions being split in half?

A A check of the books of Jaffee & Company.

Q You have reviewed the books of Jaffee & Company?

A Yes, I have.

Q During the first five or six months when you were at Jaffee & Company, what were your responsibilities with respect to paying out commissions?

A During the first five or six months I was with them?

Q No. I'm sorry. That Mr. Deutsch and Mr. Duboff were there.

A I was making out the checks.

Q How would you do that with respect to commissions going to 561?

A Of the commissions they were entitled to, they

would each get half.

MR. FEFFER: No further questions.

THE COURT: Mr. Block?

MR. BLOCK: We have no questions, your Honor.

THE COURT: Mr. Segal?

CROSS-EXAMINATION

BY MR. SEGAL:

Q Mr. Rich, are you aware of the commission arrangement that Mr. Deutsch and Mr. Duboff had at Jaffee & Company?

A In what period of time?

Q Let's try in 1968, '69, 70.

A Am I aware of it? Yes.

Q Did you know.

A At the time, no.

Q Do you know now?

A Yes.

Q Will you tell us what it was?

A They were to get on listed stocks and on over-the-counter stocks, other than new issues or syndicates, 40 percent of the gross commissions.

Q And on new issues?

A 50 percent.

Q So the lowest commission they were entitled to

of time? *****

A In addition to mine, there were four others, one in Boston, one in Atlanta, one in Columbus, and one in Los Angeles.

Q Did there come a time when you left McDonald's?

A In the winter of 1967.

Q What did you do at that time?

A I took a position with Chicken Delight, a division of Consolidated Foods, in Chicago. I was vice president in charge of the Industrial Division.

Q How long did you remain with Chicken Delight?

A Until the spring of 1969.

Q What did you do in the spring of 1969?

A I took a position with Oscar Meyer Comapny, in Madison, Wisconsin. I was general manager of the Restaurant Division.

Q How long did you remain at Oscar Meyer?

A Just for several months.

Q Did there come a time when you took another position?

A Yes. I took a position with Richard Packing Company and Richard Franchise Investment Company.

THE COURT: When?

THE WITNESS: In September of 1969.

Q What was your position at Richard Packing and Richard Franchise?

A I was executive vice president of Richard Packing Company and President of Richard Franchise Investment Company.

Q What was Richard Franchise Investment Company?

A The real estate arm for Richard Packing Company.

Q What were the functions that Richard Franchise Investment Company carried out?

A We were primarily responsible for concluding real estate transactions and operating the restaurant stores.

Q Do you know a man named Milton Cohen?

A Yes, I do.

Q Do you see him in court today?

MR. BLOCK: Conceded.

THE COURT: It is conceded Mr. Kally knows Mr. Cohen.

Q When for the first time did you meet Mr. Milton Cohen?

A In the summer of 1969.

Q Where did you meet him?

A I met Mr. Cohen at O'Hare Airport in Chicago.

MR. ROBSON: Could we have the time defined a

Q Did there come a time when you started at Richard Packing and Richard Franchise Investment?

A Yes, sir.

Q When did you start?

A September 17, 1969.

Q What was your position at that time?

A I was President of Richard Franchise Investment and executive vice president of Richard Packing Company.

Q Did there come a time when some people who had previously been with McDonald's joined Richard Packing and Richard Franchise Investment?

MR. SEGAL: Your Honor, I would ask that the leading be kept to a minimum .

THE COURT: I would suggest the same. I will let this question stand, because we have testimony along these lines, but here after I would suggest, Mr. Schatten, as you move past September of 1969 that you do not lead the witness.

MR. SCHATTEN: Thank you, your Honor.

Q Were there people from McDonald's who joined the Richard Packing and Richard Franchise organizations at about that time?

A Yes. I brought with me a former McDonald man,

Mr. William Hoppenrath, who was my director of construction, and a Mr. Don Hoth, who was my director of operations

Q Directing your attention to September of 1969, after you joined Richard Packing and Richard Franchise Investment, did there come a time when you had a conversation with Milton Cohen with respect to --

MR. SEGAL: Objection, your Honor.

THE COURT: Let me hear the question. With respect to what?

MR. SCHATTEN: A meeting in Chicago.

THE COURT: Overruled.

A Yes.

Q Will you tell the Court and jury what was said by Mr. Cohen and what was said by yourself and also tell us, if you would, was that a conversation in person or on the telephone?

A In a telephone conversation with Mr. Cohen, he requested that I go to Chicago to meet with the franchisees for the Miami area --

MR. ROBSON: Your Honor, could we have a date for this conversation?

THE COURT: Yes. When was this telephone conversation?

THE WITNESS: Some time around the 25th or so,

of September.

THE COURT: Was that after you went to work for Richard Packing?

THE WITNESS: Yes, sir.

A I received this phone call from Mr. Cohen and then a short time later a meeting was arranged in the month of September, I believe, with the franchisees for Miami, in Chicago.

Q Did you atten that meeting?

A Yes, I did.

Q Who else was present?

A The seven partners in a company called Marketing Syndicate, Incorporated, the franchisees of the Circus Wagon operations in Miami.

Q Did there come a time when you had a conversation or conference with Mr. Cohen in respect to that meeting?

A Yes, sir.

Q When did that conversation take place?

A About the day of the meeting I called Mr. Cohen on the telephone and informed Mr. Cohen of this meeting. I told Mr. Cohen that the franchisees were extremely angry over the fact that the length of time it had taken --

MR. ROBSON: Your Honor, could we have a continuing understanding that all of these conversations with Mr. Cohen are subject to connection?

THE COURT: Yes. Again, I will instruct the jury that if there is a conversation, it is being received now against the person involved in it. If there were more than one of the three defendants involved had the conversation, it is received against those who participated. As to those who did not participate, the evidence is received subject to connection, as I instructed you some time back. That will be a continuing objection which will be on the record for all of the defendants.

Q Would you tell --

MR. SEGAL: I would ask that the word "angry" in the last statement by the witness be stricken.

THE COURT: I will strike that and direct the jury to disregard "angry."

I believe you are talking now about a telephone conversation a day or so after September 25, 1969?

THE WITNESS: Yes, sir.

THE COURT: Is that the way you reported to Mr. Cohen?

THE WITNESS: Yes.

THE COURT: It was just you and he on the line?

THE WITNESS: Correct.

THE COURT: Now, you reported on the Chicago meeting. Try to tell the jury what you told him, what he said to you in exact words, or substance, if you can't quote the exact words, which is understandable.

A I told Mr. Cohen that I had attended this meeting, as he had requested, and that the franchisees for the Miami area were very upset, concerned over the length of time that it had taken to get their stores started.

The franchisees were promised that they would get these stores immediately. I told Mr. Cohen that we had a lot of difficulties --

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(In open court.)

THE COURT: You may proceed, Mr. Schatten.

Q Did you finish your testimony with respect to the conversation between yourself and Mr. Cohen, Mr. Kally?

A I believe I did.

Q I want to direct your attention to October 1969.

Did there come a time in that month when you had a meeting with Mr. Cohen in New York?

A Yes, sir.

Q Where did that meeting take place?

A It took place at the Status Marketing office in New York City.

Q Who was present at the meeting?

A In addition to Mr. Cohen and me, there were three representatives from Status Marketing, Mr. Bill Ward, president, and a Mr. Dean Ferris and a Mr. Bob Moran, vice-presidents.

Q What was Status Marketing?

A They were the sales organization that handled the selling of franchises for Richard Packing and Richard Franchise Investment.

Q Would you tell the Court and jury what you said at that meeting and what Mr. Cohen said at the meeting?

THE COURT: This, of course, is subject to

connection as to Mr. Deutsch and Mr. Duboff, who were not present.

They were not present, is that right?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

A At this meeting Mr. Cohen told me that they were setting up a $150,000, $160,000 budget for franchise advertising with Status Marketing. I questioned MR. Cohen as to the advisability of spending that amount of money on additional franchise advertising when, in fact, we were having difficulties trying to get the existing franchisees started and getting the buildings under construction.

Mr. Cohen told me that he had a letter of commitment for $20,000,000 from a Mr. Sirnow out of Michigan through a European source and that I shouldn't concern myself with this problem at this time.

Q Do you know a Mr. Bernard Deutsch?

A Yes, I do.

Q Do you see him in court today?

A Yes, I do.

MR. SEGAL: Conceded, your Honor.

THE COURT: Yes. Conceded that Mr. Kally knows Mr. Deutsch.

You may proceed.

Q When for the first time did you meet Mr. Deutsch?

A In November, around the 20th or so; November 1969.

Q Where did you meet him?

A At the Sheraton Hotel in Los Angeles.

Q Who else, if anyone, was present?

A Mr. Cohen.

Q Did you have a conversation at that time?

A Yes.

Q Would you tell the Court and jury, Mr. Kally, what you said and what Mr. Deutsch said and what Mr. Cohen said at that meeting?

THE COURT: That will be subject to connection as to Mr. Duboff, who was not there.

A At this meeting, Mr. Deutsch told me that I was doing a good job in getting the real estate and the construction jobs started. He informed me that they had a -- that he had a letter of commitment for $20,000,000 from a European source, and that I should proceed with all dispatch to get these projects started.

Mr. Cohen told me that I was doing a good job with regard to the leases that they already had in their

possession and I should definitely concentrate in this one area.

Q Directing your attention to December of 1969, did there come a time when you had a conversation with Mr. Cohen with respect to the Louisiana franchisee?

A Yes.

Q Would you tell the Court and jury what was said by you and what was said by Mr. Cohen?

MR. BLOCK: Now, if your Honor please, in connection with that, I'd like to approach the side bar.

THE COURT: You may.

(At the side bar.)

MR. BLOCK: If your Honor please, I have been over the 3500 material and I find that, and I have been over it with Milton Cohen, and I find that there are something like about ten different locations all over the country in which this witness -- in my opinion, a disgruntled ex-employee who was fired for doing a lousy job -- is going to report and has reported and explained here about problems with franchisees all over the country.

Now, this raises so many issues, this gets to be trials in and of itself, who was right, were the franchisees right, were they trying to chisel, was Cohen right, did he exercise proper judgment?

Your Honor, this is a Pandora's box that we are opening.

In light of all of that, I would ask the Government give an offer of proof with respect to the Louisiana conversation. And I am prepared to object to it along the lines that I told you. It just multiplies the issues. It's impossible to defend.

MR. SCHATTEN: Your Honor, there will not be a plethora of different locations brought out --

As I told the Court, the Government will be judicious in bringing out less than a handful of conversations with respect to these people. But in this particular case we will offer a letter which will show Mr. Cohen's knowledge that back in November -- back in December of 1969, that a franchisee's contract was long since past due and, in fact, this Louisiana franchisee had been promised a building within thirty days and ground was never broken; needless to say, a Circus Wagon was never built, and there will be a letter brought out which will show that Mr. Cohen knew this as early as December. And throughout this period, up to and including April, he was continuing to make these representations without disclosing, as your Honor cogently pointed out, the negative aspects.

MR. SEGAL: I would indicate, your Honor, are we going to be embarked on situations where statements made to this man are the things that constitute the false statements? And are we --

THE COURT: No, I should think not.

Basically, I assume the Government is offering this witness for "proof of the true facts."

Continue.

MR. SEGAL: And the other problem that seems to be raised with this,is this company under any legal or any other obligation to immediately report the folding of a given franchise or a problem with a franchise in order not to make its activities misleading?

That is what we are faced with.

THE COURT: The record reflects the Government putting into evidence a number of press releases which were put out during the period, four or five releases. That is that Exhibit 31 lettered series.

I would suggest that if they make a representation to me that during the period that bullish press releases were being put out indicating a constant growing of the business, whereas during that same period they were suffering serious erosion of people who had already signed up, this, to my judgment, would be probative in

a case like this, where the underlying charge is manipulation.

Let me see if Mr. Schatten is prepared to make that representation.

MR. SCHATTEN: Your Honor, we will show -- as I say, I am not going to go into the entire area -- but we will show representative examples of the situations where contracts were long since lying by the wayside in certain areas. There will be franchise contracts that were cancelled.

And I will go further. We will show through this witness that Status Marketing folded up just at the precise point when the most bullish of bullish representations were given out by Mr. Cohen with the 200 franchises.

This was never revealed, either.

THE COURT: Wait now. Status Marketing was a selling organization?

MR. SCHATTEN: That's right.

THE COURT: It seems to me that one could switch from one selling organization to another without a great deal of harm.

MR. FEFFER: They didn't.

THE COURT: I have difficulty following that one.

MR. SCHATTEN: Your Honor, Status Marketing, as your Honor knows from the testimony in this case, was a selling organization for the Circus Wagons.

THE COURT: Yes.

MR. SCHATTEN: Status Marketing folded up just at the point when its most bullish representations were coming out from Mr. Cohen.

Richard Packing had no selling organization left at all.

THE COURT: Did he speak in those releases and representations about their selling organization? Did he continue to tout Status Marketing as their selling organization after Status Marketing had collapsed or it dropped out?

MR. SCHATTEN: He told them in the letter to Mr. O'Meara that he had sold 60 franchises as of February and they sold another 40 a few weeks later, and then they sold another hundred.

For them to give all of that very aggressive, very bullish information at a time when their sales arm had just completely dissipated and at a time --

MR. ROBSON: That was 1969?

MR. SCHATTEN: 1970. Government's Exhibit 2 is the document.

-- at a time when they had lost their ability to sell any additional franchises, that in fact what happened -- and I will endeavor to point that out to your Honor as well --

MR. BLOCK: I don't understand this --

MR. SCHATTEN: -- is highly misleading.

If you are talking about growth from 60 to 100 to 200 within a period of less than two months, and you have completely --

MR. FEFFER: Two weeks.

MR. SCHATTEN: I am being generous, perhaps.

-- and you have completely lost your ability to sell any additional franchises, I consider that to be a highly gross misrepresentation.

MR. SEGAL: The question isn't whether you have lost your capability of marketing these things. The question is did you or did you not do it?

Is the Government prepared to show that, in fact, there were not 100 or 200 franchises sold? Is the Government saying that because we say 200 and there's 198 that we are somehow chargeable with something? Is precision the criterion here?

The Government has an affirmative obligation to demonstrate that there were no franchises sold or there

were six franchises sold or whatever.

MR. SCHATTEN: I don't think we have to pick --

THE COURT: Are you going to demonstrate that, what I will call mass defections of franchisees? If you represent to me, I know how I will rule.

If you say that it was one, I must suggest that -- what is it? -- one swallow doesn't make a summer.

MR. SCHATTEN: We will show that there were more than one franchise cancellation, and moreover, your Honor, we will show that substantially less than 200 franchises were sold.

But I think the other part is also probative on the Status Marketing aspect, your Honor.

MR. BLOCK: I have no objection to his attempting to prove the number of franchises sold.

THE COURT: I think that is germane. And I would suggest, if it is more than one or two, the number of defections, if there is a continuing flow of public information which is directed toward how we are growing when in fact it was one step forward and two steps back, that you have to count all the steps.

MR. ORENSTEIN: It could be the opposite too, your Honor.

THE COURT: Of course it could. But I think that's for proof. He will demonstrate what he thinks is the fact here. I will permit you by cross examination of this witness and by other means of course, to demonstrate that his premise is erroneous. But he is putting forth a premise which I indicated at the prior bench conference I thought had relevance to the charge of manipulation.

MR. BLOCK: Yes, but my objection is this:

When he goes in, and we are now talking about the Louisiana deal and the particular circumstances involved in the Louisiana deal, and the problems that may have been involved in the Louisiana deal and whether the franchisee was right or wrong or whether there was a

substitution of another franchisee-- I mean, all of these are open questions and we are getting into an area that I am simply not prepared on, your Honor. And there is no warning that this was going to come out. It is so unfair to present us with this kind of thing and ask us to defend against it. Not a hint.

THE COURT: I daresay that the number of franchises in a franchise operation has to be central to the value of the company and the value of its securities.

I mean, I have to accept that to start with. What you're saying is that his evidence has not probative value . I suggest that if it has less than compelling probative value, but still has value, I must permit him to offer it. But I have to do it on the one representation that you are not just going to produce one isolated instance and argue from it; you're going to indicate a pattern?

MR. SCHATTEN: Yes, your Honor.

THE COURT: That is a representation you're making to me now?

MR. SCHATTEN: Yes, your Honor.

THE COURT: I tell you this, if you cannot fulfill that representation of a pattern of defections, then I think I would have been misled here. On your representation I am going to permit the evidence of this

Louisiana franchise and other similar transactions.

If you tie it in to me and you have now by representation at least, as A, of substance and B, that it's contemporaneous to bullish announcements which only relate to increase of franchises.

MR. SCHATTEN: Thank you, your Honor.

THE COURT: You gentlemen have made your objections in what I consider a full and timely fashion. You have your exception.

(End of side bar conference.)

BY MR. SCHATTEN:

Q Mr. Kally, I believe we were talking about a conversation that you had with Mr. Cohen with respect to the Louisiana franchisee. Did you finish your conversation?

A At Mr. Cohen's request I flew to Baton Rouge and met with the franchisee. I told Mr. Cohen that upon meeting Mr. Jack Christina, Mr. Christina told me and I repeated to Mr. Cohen that he had been promised a building within thirty days and the fact that Richard Packing Company also had $25,000,000 and that he was very concerned over the length of time it had taken to get his store started.

Mr. Cohen told me that I should proceed as

diligently as possible to get the store started in Baton Rouge and that he would discuss the $25,000,000 with Mr. Christina.

I followed this conversation with a letter the following day to Mr. Cohen.

Q I show you what has been marked as Government's Exhibit 64 for identification and I ask you, can you identify that?

A Yes, I can.

Q What is that?

A This is a letter from me addressed to Mr. Cohen in St. Paul. It's dated December 9th concerning the Baton Rouge, La.

MR. SCHATTEN: I offer this document, your Honor.

THE COURT: Very well. Show it to counsel.

(Pause.)

THE COURT: Do you intend to offer some sort of response in writing from Mr. Cohen to that letter?

MR. SCHATTEN: No, your Honor.

THE COURT: All right. If you had one, I"d suggest you offer both at the same time.

MR. BLOCK: May we approach the side bar?

THE COURT: Yes.

A No, sir.

Q Do you know whether any Circus Wagons were ever constructed in Louisiana?

A There were none.

Q Do you know whether the ground was ever broken on any Circus Wagons in Louisiana?

MR. BLOCK: I object to that line, your Honor.

THE COURT: Overruled.

A Would you repeat the question?

Q Do you know whether ground was ever broken on any Circus Wagon in Louisiana?

A There were none.

Q Mr. Kally, I want to direct your attention to February of 1970. Did there come a time when you had a conversation with Mr. Cohen with respect to the franchise program?

A Yes, sir.

Q Would you tell the Court and jury whether that was a telephone conversation or a meeting in person?

A A telephone conversation.

Q Please tell the Court and jury what was said by you, what was said by Mr. Cohen in this conversation.

MR. BLOCK: When was this?

THE COURT: February 1970, telephone

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A Late December, 1969.

Q Who else if anyone was present?

A No one.

Q Was it a personal conversation or telephone conversation?

A Telephone.

Q Would you tell the Court and jury what you said and what Mr. Cohen said?

MR. SEGAL: With limiting instructions, your Honor.

THE COURT: Indeed. Since this was a two-person conversation, it will be subject to connection relative to Mr. Deutsch and Mr. Duboff.

A After I had been with the company I called Mr. Cohen in December and asked him how many stores we were responsible for in the greater Detroit area. Mr. Cohen told me that we needed five locations in Detroit.

Q Did there come a time when you had another converation with Mr. Cohen with respect to the Detroit franchisee?

A Yes.

Q When was that?

A Some time in May, I believe it was, of 1970. I called Mr. Cohen and told him that the franchisee was not

willing to proceed with five locations at this time, and was only interested in going with one store in the Detroit market.

I told Mr. cohen, based on the population and the number of competitors in the market it would be foolish at this time to proceed with just one location, and Mr. Cohen agreed with me and told me that we would attempt to get out of the real estate transaction that we were trying to conclude in Warren, Michigan, a suburb of Detroit, and that he would handle the refunding of the franchisee's money in Detroit.

Q I also know that there is a reference to a Thomas Lyden on the second page of Government' s Exhibit 65 in evidence.

Did there come a time when you had a conversation with Mr. Cohen with respect to Mr. Lyden?

A Yes, sir. I called Mr. Cohen because --

Q When was this conversation?

A It was again some time in December, 1969. Regarding my real estate activities. I called Mr. Cohen to inquire how many locations we were obligated to build for the franchisee. Mr. Cohen told me we had five locations for the Ohio franchise.

THE COURT: When was that?

THE WITNESS: In December of 1969.

THE COURT: Thakn you.

Q Taking into account that Mr. Zucker, as you testified, had five locations and Mr. Lyden had five locations, I want you to look at Government's Exhibit 65 and tell us how many locations that are reflected on Government's Exhibit 65.

MR. SEGAL: Objection.

THE COURT: It does speak for itself.

I think, and I did the arithmetic before, and nowthat you have enlightened me relative to the others, you can do the arithmetic itself. The document is received, you have established all the facts. It would be about 35 to 40. You can look at it and you can tell the jury what it adds up to, if you wish. It's in evidence.

MR. SCHATTEN: By my recollection --

THE COURT: Calculation.

MR. SCHATTEN: By my calculation, going through this, I calculate, your Honor, that there are 42 Circus Wagons franchises as of February 13, 1970 --

MR. SEGAL: Objection, your Honor, to the last statement and I move to strike that.

THE COURT: Don't testify. You have just added here to what the witness has testified. Let's leave

it at that.

MR. SEGAL: Your Honor, I ask that the statement in the question be stricken.

THE COURT: Yes, the surrounding statement is stricken. The government has added from a document which is in evidence. The jurors have all seen it. They probably added it up themselves, and of course that is what will govern. You have heard testimony now about the Zucker and the Lyden groups or franchises. I suggest that the jury from this point on can make its own calcualtions as to the number of franchises which were referred to in the February 13, 1970 memorandum, Government's Exhibit 65.

Let's proceed.

Q Mr. Kally, I notice at the top of the page, page 2, there is a reference to a Sten Ronlov, Los Angeles, one unit.

I ask you, did there come a time when you had a conversation with Mr. Cohen with respect to that franchisee?

A Yes.

Q When was that conversation?

A It was sometime in -- I believe March or so of 1970.

Q Was it a personal conversation or on the

telephone?

A It was on the telephone.

Q Tell us what was said by you and by Mr. Cohen.

A It was very short. Mr. Cohen informed me that this franchisee was no longer interested in a franchise for Los Angeles and wanted his money back. And Mr. Cohen indicated to me that he would refund this man's funds.

Q I notice at the bottom of the first page there is a reference to Joseph Murphy, Puerto Rico, two units.

Did there come a time when you had a conversation with Mr. Cohen with respect to that franchisee?

A Yes, sir. It's the second from the bottom. Yes.

Q When was that converastion?

A The latter part of 1969.

Q Can you fix a month, as best as you can?

A It probably was in December.

MR. SEGAL: I ask that that be stricken, your Honor.

THE COURT: To the best of your recollection, when was it in 1969?

THE WITNESS: December.

THE COURT: Very well. Strike the prior answer and let this one stand.

Q Will you tell the Court and jury what you said and what Mr. Cohen said?

A Mr. Cohen informed me that we had a franchissee for Puerto Rico. He informed me that he had directed Status Marketing to find a location in Puerto Rico for Mr. Murphy, who was a citizen of Puerto Rico, and I was directed to go there and approve the location that had been secured by Status Realty. Some time within the next couple of weeks I went out to Puerto Rico, approved a location that had been submitted with regard to location; I conferred with Mr. Cohen on the telephone with regard to the cost for the purchase of this property and Mr. Cohen told me to proceed with the necessary contracts.

Q Did there come a time in the spring of 1970 when you had a conversation with Mr. Cohen with respect to that franchisee?

A Yes, sir.

Q Wen, as best as you can, was that conversation?

A I believe it was either April or May of 1970.

Q Was it a personal conversation or was it over the telephone?

A It was over the telephone.

Q Please tell the Court and jury what was said

by you and what was said by Mr. Cohen in that conversation.

A I told Mr. Cohen that the cost factors in Puerto Rico were extremely high due to the fact that we had to bring a lot of materials in to build a building and due to the fact that the real estate properties were high, that the cost factor to the franchisee would be extremely exorbitant, his break -even point would be extremely high.

Mr. Cohen agreed with the figures that I presented to him at the time and we decided that we would get out of the real estate contract and Mr. Cohen told me that he would refund Mr. Murphy's franchise fees.

Q Directing your attention to April of 1970, did there come a time when you had a conference with Mr. Cohen with respect to Status Marketing?

A Yes, sir.

Q When did that conversation take place?

A To the best of my recollection it took place some time in the first week of April of 1970.

Q Was it a personal conversation or one over the telephone?

A It was on the telephone.

Q Please tell the Court and jury waht was said by yourself and what was said by Mr. Cohen.

A I called Mr. Cohen and asked him -- I told Mr. Cohen that I had heard that Status Marketing had gone bankrupt and was no longer in business, and Mr. Cohen told me ,all I do is call him with bad news, yes, that they had, and that we would now be responsible for the area of real estate finding, site findings.

Q Directing your attention to May of 1970, did there come a time when you attended a meeting with Mr. Cohen in Chicago?

A Yes, sir.

MR. SEGAL: Your Honor, I really would ask that leading not be done.

THE COURT: I thought I had directed that already. I don't know how many times I can say it, but you bring him to a date, then you ask him a question; I recognize you're trying to facilitate the inquiry, but please, please, do not lead from this point on in your examination.

MR. SCHATTEN: Thank you, your Honor.

THE COURT: You may finish this question. You have asked it already, but don't do it again.

Q Who else was at the meeting?

A That was a meeting called by the existing seven franchisees of Circus Wagon restaurants.

Q Who else was in attendance at the meeting?

A At this meeting were Mr. Cohen, Mr. Dudovitz, from Richard Packing Company, a Mr. Dean Ferris, who was now employed by Richard Packing; our Mr. Don Hoth, and Mr. William Hoppenrath, our director of construction, and me, along with the franchisees.

Q Would you tell the Court and jury what you said at this meeting and --

MR. ROBSON: Can we have those franchisees identified by something other than "the seven franchisees"?

THE COURT: Yes, if you would. Can you identify the franchisees who were present at this May, 1970 meeting?

THE WITNESS: Yes, sir. It may take me a couple of seconds.

THE COURT: Go ahead.

THE WITNESS: There was a Mr. Jack Cristina, who was the franchisee for Baton Rouge, Louisiana; there was a Mr. James Durkin, who was the franchisee for Pennsylvania; there was a Mr. Ernest Johnson, who was the franchisee for Indevors, Massachusetts; there was a Richard Johnson, who was the franchisee for Chicago; there was Mr. Michael Sayowitz, who was the franchisee for Miami, the company was called Marketing Syndicate, Inc.; and Mr. William Zucker from the Detroit area; and also Thomas Lyden

from Ohio.

I didn't count them, but I think there was seven.

THE COURT: You have named seven. Cristina, Johnson, Johnson, Sayowitz, Zucker and Lyden. Anybody else?

THE WITNESS: No, I believe that's all.

Q Would you tell the Court and jury what you said at this meeting and what Mr. Cohen said at this meeting?

A At this meeting I directed accounting to the franchisees because that was their meeting that the called. I told them that since Status Marketing was no longer in existence, that they would be responsible for all real estate related matters.

Mr. Cohen addressed the group and told them that Richard Packing was financially sound and then distributed the 1969 financial reports for both Richard Packing and Richard Franchise Investment to all of the franchisees.

THE COURT: I read the decision and, under the circumstances, I recognize from what Judge Friendly said that I have a degree of latitude within a reasonable time after the last date of the conspiracy to admit certain evidence subject to limiting instructions.

MR. SCHATTEN: And the other conversation, your Honor, takes place, I believe, in December or January of 197[illegible], '7], and as to which this witness will testify that he conferred with Mr. Cohen over the fact that $700,000 of Richard Franchise's monies were taken by Richard Packing and loaned to the Dune Buggy subsidiary, all prior to June 30, 1970, and this was the first time he learned about that.

MR. BLOCK: You know, your Honor, he has told us now about the second conversation, and I certainly object to that. That gets into a question of business judgment, with which I don't think we are concerned in this case.

We have not had the details of the first conversation he wants to elicit.

MR. SCHATTEN: The first conversation will show that Mr. Cohen stating that for a period of several months prior to June 30, 1970 the company was losing in excess of $30,000 a month. We of course offer these conversations

solely against the defendant Cohen.

THE COURT: When was that conversation?

MR. SCHATTEN: This was the August 10th conversation.

THE COURT: Well, that's a closer question, Mr. Block. I will go along with your first comment. The first one mentioned is much after the fact and it is collateral. I think this is closer to having probative value. I am prepared to listen to you, but I think in this one, the date, approximately ten days, or thereabouts, from the on or about conclusion date would not be a decisive thing from this Court's point of view.

I am interested in your comments on the probative value of the proffered testimony.

MR. BLOCK: That the company has been losing $30,000 a month for how long?

MR. SCHATTEN: For several months.

MR. BLOCK: Mr. Orenstein makes the point to me that he may not have known that at the time. The fiscal year we know is June 30th --

THE COURT: I would obviously permit latitude on cross examination, should I admit it.

MR. BLOCK: I don't think you ought to admit it, on that ground.

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testimony would clearly show the falsity of those statements.

THE COURT: The last date I show is purchases, and maybe sales, end of April 1970, and you are talking about a conversation on August 10, 1970. You say that he said that the company had been losing $30,000 a month for several months?

MR. SCHATTEN: Yes.

THE COURT: Did he say how many months?

MR. SCHATTEN: I don't believe so.

THE COURT: I am sustaining the objection.

(In open court.)

MR. SCHATTEN: May I have this marked, please.

(Government's Exhibit No. 67 was marked for identification.)

BY MR. SCHATTEN:

Q Mr. Kally, I show you Government's Exhibit 67 for identification and I ask you whether that document relates to the Indevors --

MR. SEGAL: Objection.

Q I want to refer your attention to Government's Exhibit 67. I would like you, in considering Government's Exhibit 67, to consider it with respect to Government's Exhibit 65 in evidence.

this is a complete list of all the franchisees, but it is not correct as to all the units, is that right?

A Correct, sir.

Q Weren't you being informed as to the time each and every licensing agreement was entered into? In the course of your work, when Status Marketing made a licensing agreement, weren't you informed about that?

A There was a cross-over of information, yes.

Q There was?

A Yes.

there about the franchise agreement; it just says "See Circus Wagon International," doesn't it?

A Yes.

THE COURT: Just so the record is correct, I believe you said 52.

MR. BLOCK: I'm sorry. I meant 65.

THE COURT: I just want the record to reflect that, because you are showing him 65.

MR. BLOCK: Right.

Would you mark this, please?

(Defendant Cohen's Exhibit AA was marked for identification.)

Q I show you this document. Have you ever seen that before?

A Yes, sir.

Q Is that a document that you prepared?

A Correct.

Q You prepared that?

A Yes, sir.

Q That was as of April 1, 1970?

A Correct.

MR. BLOCK: I offer it in evidence.

MR. FEFFER: We have no objection, your Honor.

THE COURT: Very well.

How about Mr. Robson and Mr.Segal?

(Pause.)

MR. ROBSON: I have no objection.

MR. SEGAL: I have no objection.

THE COURT: Very well. Received.

(Defendant Cohen's Exhibit AA for identification was received in evidence.)

Q Is this a complete list, to the best of your knowledge, of all the franchise licensing agreements and units as of April 1, 1970, and I am referring now to Exhibit AA, or was that prepared for some kind of special purpose, and is it only a partial list, or don't you remember?

A I don't remember, but it could be a partial list, because I notice that Puerto Rico is not here, and I don't know exactly when they were terminated.

have been testifying about, that is, from September of 1969 up through, say, about May of 1970 -- weren't you in very frequent contact with Mr. Cohen?

A Yes, sir.

Q Would it be fair to say you spoke to him on the telephone almost every day, maybe several times a day?

A Yes, sir.

Q Did you have frequent meetings with him?

A Yes, sir.

Q And you and he were consulting with regard to the problems involved that the company had; isn't that correct?

A Correct.

Q Almost on a daily basis?

A Correct.

Q And at the instance of the Government, you have singled out various conversations and you are giving them to us pretty much from your recollection, except as you have been shown various documents?

MR. SCHATTEN: I object, your Honor.

Q Isn't that correct?

THE COURT: If you understand the question, I will let you answer it. If you don't understand it, say so.

(Defendant Cohen's Exhibit FF for identification was received in evidence.)

THE COURT: Is that May 15th, Mr. Block?

MR. BLOCK: Yes. This is a report of Circus Wagons, units under construction as of May 15, 1970. And there is a code, (F), according to a note means a franchise store, and (C) means a company store.

Just summarizing this, it indicates that ground was broken for a store in Miama, Florida on 11/24/69. That was a franchise operation.

Another franchise operation in Youngstown, Ohio, ground br ken February 24, 1970.

Another franchise operation in Milford, Massachusetts Ground broken March 10, '70.

And for a company store, Downey, California, ground was broken April 5, '70.

Then there are figures as to the percentage of completion and the estimated opening date.

Number of units opened, 4. And they are listed.

There are two company stores, one at Anaheim, California; another at Northridge, California, and two franchise stores, one in Toronto and one in North Miami, Florida, and they are opened on various dates between 11/15/69 and March 17th of '70.

A The prospective franchisee for Lexington Kentucky I believe wanted to sell us his particular piece of property, and I believe his franchise was almost contingent upon us buying or leasing his properties.

Q Do you know how many, if any, other situations existed like the Lexington situation?

A To the best of my knowledge, that was the only one.

Q Were there other ones on that kind of a situation where that took place with any other franchisees?

A I don't understand your question.

Q By that I mean, this was a franchisee obviously trying to make some money by selling the company's land and then taking the franchise back, is that right?

A Possibly.

Q Was there anybody else who came up with any other wrinkles in which he would be selling at the same time that he would be buying something?

A To the best of my knowledge, that was the only one.

Q In any event, it is true, is it not, that the matter of franchises and the matter of the contingent possibly connected with the franchises are myriad, right?

A Yes, sir.

Q And that the business of franchises is a little more complicated, perhaps, than selling a can of peas out of a grocery store?

A Correct.

q And that very often there are caveats or there are conditions that have to be fulfilled before other things happen, is that right?

A Yes, sir.

Q And that is a natural occupational disease connected with the franchising business, isn't it?

A Yes, sir.

Q Do you know whether the company acquired land from Youngstown, Ohio?

THE COURT: At any time?

MR. SEGAL: No, your Honor. I had indicated to the witness I am talking as of February of 1970.

THE COURT: Very well.

A I believe the company had entered into a ground lease in Youngstown prior to my joining them.

Q Do you know whether or not ground was broken in February?

A Yes, sir, ground had been broken.

Q When we talk about breaking ground, I assume it doesn't mean somebody walking over and kicking the

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Q Did you ever state to the Government that that information came to you by Mr. Cohen?

MR. BLOCK: Cohen?

THE COURT: Yes, he said Cohen.

Did you ever tell the Government that that information about the $20,000,000 came to you from Mr. Cohen?

THE WITNESS: Yes, sir.

Q Read 2555 and I ask you the same question.

THE COURT: 3555?

Q 3555.

Did you not tell the Government that that information came to you from Mr. Cohen?

A Yes, sir.

MR. SEGAL: No further questions, your Honor.

THE COURT: Very well.

Mr. Robson?

CROSS-EXAMINATION

BY MR. ROBSON:

Q Mr. Kally, during the period that you were employed by McDonald's, you developed a substantial amount fo experience as to the operation of franchise chains in the food business; is that right?

A Yes, sir.

Q And you became pretty sophisticated about knowing

which locations were good and which ideas were good, et cetera; is that correct?

A Yes.

Q When you decided to join Richard Packing after talking to Mr. Cohen, was that on the basis of any checking that you had done of the Circus Wagon concept, the whole thing?

A Yes, sir.

Q You checked it out with various people and satisfied yourself that it was a pretty good idea, didn't you?

A Yes.

Q You really thought it was going to sell?

A Yes, sir.

Q And sell fast, really good?

A Yes, sir.

Q As a matter of fact, you hoped to make a considerable amount of money as income based upon the earnings of that company, did you not?

A Correct.

Q When you concluded that it would sell, am I correct that what you concluded was that you'd be able to find franchisees without too much trouble, is that correct? Not you, that the company would be able to find

franchisees, is that correct?

A Yes, sir.

Q And that you'd be able to find good sites without too much trouble; right?

A Yes, sir.

Q And that the operation would be profitable financially?

A Correct.

Q Let me go through with you quickly the process of selling a franchise.

Mr. Segal asked you, I think, at one point, whether it was not true that selling a franchise was a little different from selling a head of lettuce, and I think you agreed it was.

A Correct.

Q In fact, a man doesn't walk into the office and say, "Here's my check; give me a franchise." It's not that simple, is it?

A Correct.

Q Generally speaking, what happens, is this not true, is that pursuant to an advertisement in the newspaper or some other source, an individual will communicate with the company and indicate an interest in acquiring a franchise? Step No. 1?

MR. ROBSON: Does that bother you very much, Mr. Feffer? I hope you won't make comments.

THE COURT: I would hope nobody makes any comments. We are going along very nicely here.

I didn't hear any comments, and I hope we can continue on the same level as we have.

MR. ROBSON: I was closer, your Honor, and I did hear.

Q Suppose a man put up a good-faith deposit, $2,000, $5,000, $10,000; would you consider that a sale, if the contracts had not yet been signed and there were still some steps to be taken, like locating some satisfactory sites?

A Depending on the deposit, what type of a note this deposit would consist of.

Are you talking about note or money?

Q Note or cash.

A I would then consider that more a bona fide sale, yes, sir.

Q Even though the land had not yet been located and the contracts had not yet been signed?

A Correct, because I think this puts the burden on both people now to fulfill the agreement.

Q And yet the fact is that one month, two months,

three months down the road, that deal might fall through?

A Correct, sir.

Q So that there could be a situation in March of '69, let's say, before you joined the company, where a purchaser had given a good-faith deposit, intending -- indicating his intention to acquire a substantial number of sites --

A Correct.

Q -- which would be considered a sale by you, and yet that deal might fall through completely, for any one of a number of reasons, including inability to get land, or any one of a hundred reasons; is that correct?

A Correct, sir.

MR. ROBSON: I have no further questions.

THE COURT: Thank you.

Mr. Schatten, you may inquire.

REDIRECT EXAMINATION

BY MR. SCHATTEN:

Q Mr. Kally, you testified on cross-examination that you told the Government that Mr. Cohen had told you about the $20,000,000 coming in from a European source; isn't that right?

A Yes, sir.

Q Do you know, Mr. Kally, whether any other people who had Circus Wagon franchise contracts with Richard Packing and Richard Franchise Investment as of April 1, 1970, who are not listed on Mr. Cohen's Exhibit AA?

A The only one I can think of that is not on this list is the Canadian franchise.

Q How many franchises did the Canadian franchisee have?

THE COURT: How many units?

Q How many units?

A One.

MR. SCHATTEN: Mr. Block, may I have Mr. Cohen's Exhibits DD, EE and FF, please?

MR. BLOCK: Of course.

(Pause.)

Q There is a reference on Mr. Cohen's Exhibit EE, bottom of page 1, top of page 2, that is the May 18, 1970 notes or letter that you wrote regarding the franchisee meeting in Chicago, Illinois May 9, 1970. The reference is "A copy of the financial statements of Richard Franchise Investment and Richard Packing has been furnished to each of the franchisees as they had requested."

Who furnished copies of the Richard Packing and Richard Franchise financial statements to that meeting?

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Q What was Resort Products?

MR. BLOCK: That I object to. The mere fact he has his offices there, it seems to me, doesn't open up the subject for redirect.

THE COURT: Sustained. Next question, Mr. Schatten.

MR. SCHATTEN: Thank you, your Honor.

Q What problems were you referring to when you talked about the problems in 1969 and 1970 in connection with the development of franchis ?

A The company had entered into quite a few leases without any contingencies involved and were paying rent without actually having been able to begin construction.

The problems were to get these particular locations started in the various states mentioned before.

Q Were there any other problems?

A The problems regarding -- the major problem was the real estate and construction beginning.

Q Do you know whether there were any problems in connection with financing --

MR. ROBSON: The witness testify and he didn't require any further help from Mr. Schatten.

THE COURT: Sustained. Just state your question, sir.

Q Do you know whether there were any other problems?

A In 1970, the inability to --

MR. BLOCK: I am going to object to talking about any period in 1970, which is subsequent to the date that your Honor --

THE COURT: Yes. If you're going to talk about 1970 and talk about a period in 1970, would you tell us first what date you're talking about before you get into the subject matter?

THE WITNESS: The period of April and May of 1970.

THE COURT: I will permit an inquiry in that area, Mr. Block.

Q Will you answer the question, what problems were there?

A The financial problems with regard to real estate, construction. The other period of time, maybe the latter part of May, 1970, with --

Q would you tell the Court and jury, Mr. Kally, what were those problems?

A Financial problems.

Q Would you describe them in detail, please?

A SLow pay on construction projects, slow pay of

suppliers, delays in moving real estate contracts through the ST. Paul office, a slow down of field service visits at the request of Mr. Cohen --

MR. BLOCK: I didn't get that.

THE WITNESS: A slow down of field service visits, operations visits to --

Q Will you explain that, Mr. Kally?

A That was at Mr. Cohen's request, that we not have people make field trips to the operating stores in Ohio or Miami at that particular period of time. I remember specifically a direction from Mr. Cohen that I don't go to Ohio, because of cost factors. I think everything basically revolved around finances at this time.

Q I want to refer you, Mr. Kally, to Mr. Cohen's Exhibit CC, and I want you to look at the letter and read it (handing).

(Pause.)

A I have read it.

Q There is a reference there about notifying Status Marketing of an increased fee in the amount of $25,000 as of May 1st. Do you know whether Status Marketing sold any franchises after March 30, 1970?

MR. SEGAL: Objection.

THE COURT: Overruled. Do you know whether or

the fact that this was actually accomplished, an actual accomplished fact, and if so, what did you say?

A I believe I said --

Q To whom?

THE COURT: Wait a minute. One step at a time. You have asked a double question and you're getting unfortunately, a double answer.

MR. SEGAL: I will ask one question at a time.

THE COURT: Are you going to withdraw the question?

MR. SEGAL: Yes, your Honor.

Q Did you ever state to anyone the fact that you had heard that there was a $20,000,000 commitment?

A Yes, sir

Q Was that person or were those persons franchisees?

A Yes, sir.

Q Who were they?

A To the best of my recollection they were a Mr. Cristina, a discussion with Mr. Sayowitz. I believe those were the only two, sir.

Q When were these discussions held?

A I believe in Mr. Cristina's case, in Baton

MR. SCHATTEN: 64, your Honor.

(PAuse.)

MR. SEGAL: I object to this on the ground that there is nothing in the testimony, nothing in the redirect which makes it any more admissible than it was before.

MR. BLOCK: I object to it too.

THE COURT: I will hear counsel at the side bar.

(At the side bar.)

RM. SCHATTEN: Your Honor, it is the government's position that, as your Honor indicated, in originally ruling this out, you suggested to other counsel if they opened the door we could get in this. Mr. Segal spent extensive time on rerecross discussing the conversations with Mr. Cristina, discussing whether Mr. Kally had ever discussed the $20,000,000 commitment.

THE COURT: I heard it.

MR. SEGAL: I would like to know what door has been opened by mention of a name? If the area of opening the door means that you merely mention the name and that brings everything in, then I don't know what opening the door means.

THE COURT: You placed in issue the credibility

of this witness on a subject and the subject I am referring to at this moment is whether or not he discussed the commitment, the letter committing millions of dollars worth of funds, $20,000,000, or whatever it was, with anyone.

He said, according to my notes, that he discussed it, among others, with Mr. Cristina, whether he met with him, and with Sayowitz, and since you placed his credibility in issue on this subject, I think in rebuttal the government is entitled to come back and offer this.

MR. SEGAL: And show what, your HOnor? They are going to show he had a discussion with Milton Cohen. So what?

THE COURT: It supports the proposition he was talking about this large commitment long before he spoke to the government.

MR. ROBSON: Quite the contrary, your Honor. He says he has heard that a franchisee heard something about it. If anything, this tends to contradict what he says because he apparently doesn't know anything about it.

1 rmmch Kally-redirect

THE COURT: Then I will permit you to argue that, but, as far as I can ascertain, Mr. Segal, you opened the door to the conversation with Cristina relating to the commitment and though I did not let this document in, and I sustained an objection when it was initially offered, I am constrained, unless I hear some new and compelling argument, to overrule the objection.

MR. SEGAL: Your Honor, this statement doesn't indicate anything at all about the fact that the Richard Franchise $20,000,000 -- all it says is that this is an internal discussion between this witness and Mr. Cohen and it says, "We are talking in these terms," but not that it was conveyed.

THE COURT: Would you like a voir dire examination before I rule?

MR. SEGAL: I would rather cross him than have a voir dire, your Honor.

THE COURT: You may do that.

MR. SEGAL: I don't see that this has been opened in this sense, or that it is probative. The Government was allowed to go into this $20,000,000 out of left field, and indicative of the way the Government proof is coming in, they throw something in and it explodes in their faces, and if we go into it, they go into all the

other nuances --

THE COURT: I kept this out yesterday.

MR. SEGAL: The $20,000,000 was in through the testimony and it shouldn't have been in, but I couldn't stay away from it.

THE COURT: Once you inquire and open the door, I have an obligation to admit material such as this, not in the first instance, but when the door is opened.

The objection is overruled.

(In open court.)

THE COURT: Government's Exhibit No. 64 for identification will be received.

(Government's Exhibit No. 64 for identification was received in evidence.)

MR. SCHATTEN: Your Honor, may I be permitted at this time to read this to the jury?

THE COURT: You may.

(Mr. Schatten reads to the jury from Government's Exhibit No. 64 in evidence.)

BY MR. SCHATTEN:

Q Mr. Block, on his re-recross, made reference to his Exhibit II for identification --

THE COURT: You are a little far on that. I think it was Mr. Block's recross examination.

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open any doors in this matter.

THE COURT: I would be inclined, Mr. Feffer, to indicate now that I would rule against the inadmissibility of the chart relating to Harvey Cohen, which is 46 for identification.

Now, would you speak to the chart relating to Milton Cohen? I gather from what you said, Mr. Block, that you don't contest the accuracies of the underlying data?

MR. BLOCK: That's right. If your Honor please, I have a fundamental objection which I brought to your Honor's attention off the record a couple of days ago, and that is that there is no proof whatsoever that Mr. Cohen in exercising rights accorded him under the securities laws as an insider, or a control person, to sell a very limited amount of stock, unregistered stock in six=month periods, that that is what is involved here.

I don't think there is any question about that, and the prejudice arising from the exercise of its lawful right, in the absence of any evidence, showing that this was done in connection with any desire to violate the law, is the basis on which I urge that this document not be received.

THE COURT: Mr. Segal and Mr. Robson, I will

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hear you relative to the proffered offer of Government's Exhibit 48 for identification, which of course will be received relative to Mr. Deutsch and Duboff as subject to connection.

MR. SEGAL: Your Honor, I would of course object to it and I would object to it even subject to connection. There is nothing in the information or in the indictment which would indicate that Cohen's private sales were a part of or even contemplated by the conspiracy here, nor that they in fact had anything to do with this stock being traded up or the intention of Mr. Cohen to indicate or intimate that they were part and parcel of whatever inferences can be drawn from this by Mr. Cohen.

I think it wuld be totally prejudicial and if it is admitted, it should be admitted solely as to Mr. Cohen and not subject to connection. This is not a part of the conspiratorial nexus at all and this would be a new charge that we have no way of contending against, nor was it anything that the government saw fit to include in the information or the indictment originally returned.

MR. ROBSON: If I understand Mr. Feffer correctly, the real sole basis for offering this, which he claims is foundation for offering it, is to show Mr. Cohen made a profit on the sale of his stock.

I know that profit is not an unlawful activity, but, as a matter of fact, a highly desireable which most of us have at one time or another tried to accomplish in the stock market, generally unsuccessfully.

If there is evidence that these profits were tied into the manipulation, we might have another story. The fact that they happened to have occurred during a period of a year or a year and a half when the government alleges a conspiracy in 17 or 18 stages -- that's a hyperbolic statement -- but the fact that they occurred during this period of time doesn't, it seems to me, automatically tie the two together. All we have is coincidence of period. For that further reason, I object, plus the fact that this evidence seems so slightly probative of anything I think it is hardly necessary to establish that any president of a public corporation has a motive, if he wants to, to make a stock move.

The fact that he also made dollars on the side doesn't add a great deal, but it does create a lot of prejudice in this case. The jury hears about $400,000 and it rubs off on my client and Mr. Segal's client with very limited probative value.

Under the new federal rules, which haven't yet ben adopted, the Court is given discretion to keep out

evidence even though relative and probative if the prejudicial value outweighs the probative value.

MR. BLOCK: There is one other point I want to make to your Honor, and that is this:

This chart shows that Mr. Cohen bought 500 shares during the period and sold 13,250 shares, and I think this is important, your Honor, because under the one percent rule during that period, and this is subject to check by the government, he would have been entitled to sell upwards of 34,000 shares -- in other words, 34,000 plus, you know -- so what he was doing here, really, was selling approximately one-third, or a little less than one-third of what he was lawfully entitled to sell.

THE COURT: There is something in the Dribbel rule or was, relative to a group, if I recall correctly --

MR. ROBSON: There still is.

THE COURT: There still is. All right. I'm not sure if, for example, Mr. Cohen and his brother would be considered members of the group. I would suggest that if they are, there is an explanation, and if that is the case, were you to bring this out, I would suggest that this would involve an opening of the door relative to Harvey Cohen.

Is there anything else you wish to say before

we hear from Mr. Feffer?

MR. BLOCK: No, no, what I am talking about is Milton Cohen himself, on the basis of his own holdings, had the right to sell 34,000 plus.

(Pause.)

THE COURT: Is there anything else you want to add before we hear from Mr. Feffer?

MR. BLOCK: No, your Honor.

MR. FEFFER: Just briefly, your Honor, this is evidence of substantial gain, profit-wise, close to a half-million dollars, as a result of the very acts that Mr. Cohen is charged with doing in the present information, that is, manipulating the price of the stock and causing it to rise.

Furthermore, I think there are other things about this document which are noteworthy, the fact, for example, that ?,500 shares are sold through Kelly, Andrews & Bradley, the fact that the last, oh, 10,000 -- I'm just taking a guess -- are sold through to New Dimension and then go right to the Denver funds. This is additional reasons why I think the jury could look at this and ask some very serious questions.

Basically, your Honor, it is a man profiting by what the government contends is the result of an illegal act which is charged in the information.

THE COURT: And you would want that offered directly against Mr. Cohen and subject to connection against Mr. Deutsch and Mr. Duboff?

MR. FEFFER: Yes, your Honor, that would be fine for now, but eventually we would ask, obviously, that it all be connected.

MR. SEGAL: I would indicate that the government which is asking for a subject to connection nexus might be indicating there is a two-conspiracy problem, and if there is a conspiracy to manipulate stock, is the government going to be saying there is a conspiracy of the defendant Deutsch and the defendant Duboff to share in these proceeds?

THE COURT: No, but if each got his own piece of the action, so to speak, I would think that you would have one conspiracy despite the fact that one would gain by selling his own stock and the other would gain in some other fashion.

I think at the moment, from what I have heard--I conclude, at least, from what I have heard, that what the government is talking about is one conspiracy and of course a single conspiracy can have more than one object or more than one means of effecting results which result in profits to various of the conspirators.

I think I have heard enough, gentlemen, to rule on Exhibits 46 and 48.

The objections which have been made to Government's Exhibits 46 in evidence, which relate to the transactions of Harvey Cohen, that objection, or those objections, are sustained.

The objections which have been made to the offer of Government's Exhibit 48 for identification, which relate to purchases and sales by Milton Cohen, who is on trial here, those objections are overruled.

MR. BLOCK: May I just ask one question, and that is, would the government be willing to stipulate in connection, in light of your Honor's ruling, thatthe sales shown here were all lawful under the Securities Act?

MR. FEFFER: No, your HOnor.

THE COURT: The government chooses not to stipulate and I am not going to force them to do so.

MR. BLOCK: Will you make a statement to the jury, then, because all I am asking is for the fact, that--

THE COURT: May I suggest that you may want to include this in your requests to charge? I might suggest that I would consider it in that context.

I just would like to get from the government confirmation of a year I think I put to Mr. Block when he

Bradley firm trading profit" -- well, on the third line you have Kelly, Andrews & Bradley profit, $4,050. That is what the chart shows, 47?

A Yes, sir.

Q So that this figure was corrected, then, with this red writing at the side?

A Yes. I had not completed the total computation --

MR. BLOCK: I move to strike that out, your Honor. I didn't ask him that.

THE COURT: Yes. Strike it. The jury will disregard it.

MR. FEFFER: Your Honor, may I suggest now that document, since it was referred to and read from, that it be offered in evidence?

MR. BLOCK: I am just discussing that with my co-counsel, your Honor.

THE COURT: You now have the advantage of the government's suggestion and you know there is no opposition to the offer, should you choose to make it.

(Pause.)

MR. ROBSON: Your Honor, I have not really had a chance to examine it, but we went through a great deal of effort to get this chart agreed to as a fair representation of certain facts and I don't really want to get

involved in reviewing another chart --

MR. BLOCK: All right, I am not offering it in evidence.

THE COURT: Very well.

I suggest, then, you return it to Mr. Feffer.

MR. BLOCK: Yes, sir.

Q No, sir, it is correct, is it not -- let's talk about the stock that Kelly, Andrews & Bradley acquired at $28 on March 18, 1969, as shown on 47; that is in the second box at the top.

They paid $28 a share for this and that was taken in by the Kelly, Andrews & Bradley firm trading account, right?

A Yes, sir.

Q That could be considered an original subscription, couldn't it? Is that within your area of competence? Do you feel qualified to answer that question?

A Not being an attorney, I may have an opinion you don't agree with.

Q All right, you feel it involves questions of law?

A That's correct.

Q Let's take it this way:

Kelly, Andrews & Bradley buys 500 shares of

an original issue of 10,000 shares at $28 on March 18, 1969 -- isn't that right?

A Yes.

Q Now, Kelly, Andrews & Bradley could conceivably have held that stock for six months or a year instead of disposing of it within the next few days, isn't that correct? They could have?

A It's possible.

Q As it happened, and what you reflect on the chart, is that Kelly, Andrews & Bradley on the same day got rid of it at a profit of three points, right?

A Yes.

Q If Kelly, Andrews & Bradley had held that stock until June of 1969, at which time they had sold it, say, at a loss, would you have reflected that on the chart, if it were left to you, or would you have asked for instructions from the United States Attorney with respect to that?

A I would have reflected anything the record showed.

Q You mean in accordance with the instructions of the United States Attorney, isn't that right?

A In accordance with instructions, I was to prepare --

Q Right. That is all I want to know.

A Yes.

Q Let me ask you something, sir:

On the 5,000 shares at $28-1/2, the transaction in the middle box of the first line of five boxes on 47, you show 5,000 shares at $28-1/2, and that is where Financial Venture Fund bought the stock through its account at Jaffee, from Kelly, Andrews & Bradley; right? That was the transaction?

A Yes.

MR. FEFFER: Your Honor, may I suggest we try to prop this up on some chairs so that everyone can see it?

THE COURT: Yes.

Q Are you saying that Financial Venture Fund had to pay or was charged commissions on that transaction by Jaffee & Company and also by Kelly, Andrews & Bradley?

A That's correct.

Q Well, I call your attention to Government's Exhibit 50, which is the purchases of Richard Packing Company common stock by Denver Mutual Funds through Jaffee & Company, and am I not correc t that on that first line we talked about -- just let me finish my question -- you showed the purchase by the Fund on March 18, 1969, and the Fund is Financial Venture Fund, 5,000 shares,

price $28-1/2, source of stock, Kelly, Andrews & Bradley, and the commission was $1,052.50; right?

A Correct.

Q Referring now to 48 in evidence, and that is the document the jury already has, Schedule of Purchases and Sales by Milton Cohen with Respect to Richard Packing Company from October 7, 1968 to February 20, 1970, Loew & Company -- do you have the chart in front of you?

A Yes.

Q Loew & Company has a branch in Minneapolis, and did you find where Mr. Cohen sold stock through Loew & Company he was dealing with the Minneapolis branch?

A I believe he was.

Q And the other side of the transaction was -- of some of the transactions, anyway, was John Stephens & Company, also a Minneapolis broker; right?

A That's correct, yes.

Q Did you review in this connection any legal opinions in connection with these sales?

A I saw several legal opinions.

Q Did you match the legal opinions up to the sales?

A No. I didn't have all the legal opinions.

Q I see.

Well, do you know of your own knowledge that all

of these sales by Mr. Cohen were lawfully made under the so-called 1 percent rule of the SEC? Do you know that, sir?

A To the best of my knowledge, I do know that Mr. Cohen had opinions of counsel to the effect that these sales could be made.

Q Right. That is a customary way of insiders, and Mr. Cohen was an insider at this time, to dispose of their unregistered stock?

Are you aware of that?

A Yes.

Q Are you aware, from your work on this case, that Mr. Cohen, at least in October of 1968 and up through the stock dividend --

A Mr. Block, I am having trouble hearing you.

Q I'm sorry.

Are you aware that Mr. Cohen, in October of 1968 and, as a matter of fact, up through May of 1969, when the first stock dividend was declared, owned 187,500 shares of the company?

A Yes. I believe that is reflected --

Q In the original registration statement?

A In the balance sheet.

Q And in the original offering circular of Richard Packing, Exhibit A; isn't that right?

have records and documents which were provided to us by Richard Packing Company and I have discussed this with Mr. Block in some detail, and I believe that he's prepared,at least to the underlying records, to stipulate as to authenticity. Bank account records, checks and the like.

THE COURT: All right.

Let me hear from Mr. Block on this subject.

MR. BLOCK: I have had this document and I object to it very, very strongly on several grounds.

The first ground is that, as your Honoe well knows, here is no charge in this information that there was anything wrong with the application of the proceeds of the second Reg A offering.

THE COURT: Let's clear that up right now.

Mr. Feffer,do you accept that premise or do you reject it?

MR. FEFFER: I reject it, your Honor.

MR. BLOCK: Let Mr. Feffer then point to where there is anything about this in the information.

(Pause.)

MR.FEFFER: Paragraph 11(g), I believe it is, states that on or about March 11, 1969, Milton Cohen, Bernard Deutsch, the defendants, caused to be filed with

the United States Securities and Exchange Commission a false and misleading offering circular in connection with the purported public offering of 10,000 shares of Richard Packing stock, which failed to disclose, among other things -- and it lists certain things with some specificity.

MR. BLOCK: In other words, this is supposedly included in the "among other things"?

It's a guessing game, your Honor. I think it's just so unfair. It's typical of what we have been confronted with in this case.

THE COURT: It's certainly not included among 1 of (g). It's certainly not included in 2.

I must suggest I don't think it's included within 3, 4 or 5.

I would suggest that I would not accept it as "among other things."

Is there anything else in the information which charges the defendants, or any of them, with a misuse of the proceeds of the Reg A?

MR. FEFFER: Not specifically, your Honor, except in the paragraphs that I have referred to, as far as I understand.

THE COURT: I do believe, Mr. Feffer, that there

is a point at which this Court must draw a line. I think that we have reached it here.

I do not find it within the four corners of the information. I do not accept that "among other things" permits you to prove anything and everything at the trial.

Do defense counsel have any other objections not already voiced to Government's Exhibit 45 for identification? I will hear from you gentlemen, and then I will hear from Mr. Feffer in response.

MR. BLOCK: My theory is, your Honor, that I quit when I am ahead.

THE COURT: Very well. I just wanted to give you the opportunity to ice the cake if you felt it appropriate.

Mr. Segal?

MR. SEGAL: Your Honor, I have the same feeling. I think the Court has pegged precisely what the main objection would be. I think also by pegging it that way and by the Government's failure to ever respond to a bill of particulars saying this particular item would open us up to an area that might take weeks to explore. It might very well take an exploration that certainly we have not been put on any notice for. It is impossible to guess as to what the Government has meant in the fact that there

were false statements made, when none has in fact been delineated.

So that, as the Court has indicated, has been the nub of what the objection would be under these circumstances.

THE COURT: Mr. Robson?

MR. ROBSON: I can add a couple more, your Honor, at least so far as Duboff and Deutsch are concerned.

Number one is that there is no testimony in the record at this point to indicate that the intent may have been so that even if there was any possible theory under which it would come up, the actual use of the proceeds is not indicative of what the intent was at the time, so we have a whole new area that has to be explored here.

Number two, as far as the chart itself is concerned, this is not like the other charts which merely consists of a summary of records. This is now a subjective interpretation of those records, because what it purports to do is to set aside certain company's assets as having been used for certain purposes.

Since we are talking about an operating company that has a constant inflow and outflow of funds, you get into much more serious questions. I'm sure your Honor has

had occasion when you had to prepare a use of proceeds description, it's difficult to know which money is applied to which.

So, I think at this stage of the case, without any evidence at all, the chart would be inadmissible.

Finally, as far as both Deutsch and Duboff are concerned, I don't see how this can be possibly connected to them.

THE COURT: I will hear from you now, Mr. Feffer, if there is anything that you want to point out to the Court or add to what you have said previously.

I think you have a general idea of the Court's thinking in the matter, but I certainly will hear you.

MR. FEFFER: Just basically the information and the previous indictment charge a filing with the Securities and Exchange Commission of a document which was false and misleading. Specifically, it was with reference to the circular that was filed to become effective on March 11, 1969, which is 5-B in evidence.

The Government's position is that that was sufficient, in and of itself, to allege that this document, which is not by any means lengthy, except if you take out the financial statement you are talking about, a ten-page document, that this document in itself contained misleading

information, and that the defendants mentioned, when they filed this document, knew that to be the fact.

There is a section in 5-B that is entitled "Application of Proceeds," which is on Page 7.

THE COURT: I am looking at it right now.

MR. FEFFER: That is a section which is contained in the offering circular which the Government maintains is false and misleading.

THE COURT: I would ask you one thing:

I note that the checks which you mention were drawn between -- or cleared between April 1 and April 29, 1969, which, of course, is some weeks after the Reg A became effective.

Do you have proof or can you make an offer that any of these payees, that the commitments to any of them were made on or before March 11, 1969?

MR. FEFFER: I'm not sure I follow your question, your Honor, for this reason, that --

THE COURT: I am thinking out loud to you that you are talking in essence about a siphoning off of proceeds which you say should have gone into Circus Wagons.

MR. FEFFER: That's correct.

1B p.m.

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MR. FEFFER: That's correct.

THE COURT: This was a representation which was made as of March 11, 1969, the effective date of the offer. You show an application of proceeds, you say, different than what was represented?

MR. FEFFER: That's correct.

THE COURT: But that application is on dates which are or were in the future on March 11, 1969. If you could show, perhaps, that some of these commitments that were paid for between April 1st and April 29th were commitments already in force and effect on March 11th, which Mr. Cohen or others working with him had committed themselves to pay on or before March 11th, I might hear you further.

Do you have any such proof or would you be asking me to presume that these were pre-existing obligations?

MR. FEFFER: I'm not sure whether it makes any difference whether they were pre-existing obligations or not. The application of proceeds section is very specific with what is supposedly to happen with respect to the proceeds of the offering, which is $280,000.

The $280,000, your Honor, was supposed to be set aside for various things that are listed, including Circus Wagon and prototypes and franchises, and funds that

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were not readily available for that purpose were to be put in an FDIC bank or securities --

THE COURT: Couldn't you have charged the defendant in words or phrases with a misapplication of the proceeds of this offering? If you would have done that, you would have put them on notice of these charges.

MR. FEFFER: There is one further point in this regard too, your Honor --

THE COURT: Answer the question.

MR. FEFFER: There is one other point in that regard. Mr. Kally was examined in some detail about the financial condition of this company and how the company was losing money in its franchises, etc., and that there was a lot of inferences drawn from there that it was the fault of Mr. Cohen, but high labor costs and they ran out of money.

This chart also goes to show, your Honor that during the time of the conspiracy that money that was supposed to have been set aside for various specific purposes was going into this like dune buggies and going into stock purchases that are set forth here. So for that reason alone, your Honor, it's responsive.

THE COURT: Where do you charge this in the information?

MR. FEFFER: I think it--

THE COURT: Where do you charge in essence a misapplication of the proceeds of the public offering?

MR. FEFFER: We have charged a false and misleading circular that was filed with the Commission.

THE COURT: Yes, and you have indicated in your information certain areas of falsity specifically.

MR. FEFFER: I just don't think, your HOnor, that the government in an information or indictment is required to put down and place down every single false item contained in a document.

THE COURT: I could agree with you on minutiae, but I don't consider an allegation that there was a misapplication of half of the proceeds, almost half the proceeds of a $280,000 offering to be minutiae. And I think that at this stage of the proceedings to put this in evidence, in view of the phraseology of the information, would be sufficiently prejudicial as to jeopardize any verdict which you might get. Under all of the circumstances -- you didn't answer a copy of my questions but I am going to pass on it.

I will ask you if there is anything else you wish to add before I rule on the admissibility of Government's Exhibit 45 for identification.

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United States against Mayo decided in this District by Judge Weinfeld and United States against Kane decided in this District by Judge Feinberg which held that the words are improper surplusage and may not be contained in the indictment because they could be used by the prosecutor to introduce other charges not found by the grand jury.

THE COURT: In view of the Court's decision in this juncture and knowing what the government has indicated in the way of proof, does the government object to counsel's motion to strike the words "among other things"?

MR. FEFFER: Yes, your Honor.

MR. SEGAL: Your Honor, I think for the record that application should be deemed as having been made by all counsel in this case.

MR. BLOCK: I join in it.

THE COURT: The application is granted. The words "among other things" will be deleted.

Bring in the jury.

(Jury entered the courtroom.)

THE COURT: I hope the jury enjoyed their somewhat longer than usual luncheon recess. As you probably observed, I had brought counsel back sooner and we were able to take care of several matters, so that I am hopeful that we will be proceeding fairly steady through the

July 27th?

A May I explain that?

Q You may answer the question, and then we'll see if you can explain it.

Did you attempt to get the closing figure on Richard Packing stock on July 27th?

A I really can't answer that question yes or no.

THE COURT: All right. Next question.

Q Very well.

You don't know whether or not you did attempt to get it?

MR. FEFFER: Objection. Asked and answered.

MR. SEGAL: I'm not quite sure that I understand that answer, your Honor.

THE COURT: I'm not quite sure I understand the question, but I am going to allow it anyway.

Q Did you try to get the closing figure on Richard Packing stock for July 27, 1969?

A I, personally, no.

Q Did anyone who was assisting you or working with you try to get it?

A I believe that other investigators working on this case may have tried to get the figures. I do not know.

MR. FEFFER: Your Honor, the government calls Frederick Mazzeo.

F R E D P A U L M A Z Z E O, called as a witness on behalf of the government, being first duly sworn, testified as follows:

MR. FEFFER: May I inquire, your Honor.

THE COURT: You may.

DIRECT EXAMINATION

BY MR. FEFFER:

Q Mr. Mazzeo, how are you presently employed?

A I am a trader at Herzog & Company.

Q What is a trader?

A Well, we principally deal in over-the-counter securities and we create the market in unlisted stocks.

Q You mentioned that you were with Herzog & Company. What type of company is that?

A Principally an over-the-counter trading firm.

Q I direct your attention back to 1968. Could you tell the Court and jury how you were employed at that time?

A I was employed by V.F. Naddeo & Company, on the same status, as a trader for them.

Q What type of company was V.F. Naddeo?

A Over-the-counter trading firm.

Q [illegible] a large firm?

A We were one of the top ten trading firm at that time?

Q That means in volume, in that sense.

A Volume, wire system -- we had a very, very large wire system that went to practically all the member firms in the metropolitan area, plus a wire system that went through the United States, coast to coast.

Q Do you know a Bernard Deutsch?

A Yes.

Q Do you see him in the courtroom?

A Yes.

MR. SEGAL: Acknowledged, your Honor.

THE COURT: It is conceded that Mr. Mazzeo knows Mr. Deutsch.

Q When did you meet Mr. Deutsch, approximately?

A I would say around the middle of 1968.

Q Where did you meet him?

A I met him at a place called The Pub. I was introduced to him by a mutual friend and we had a drink together at this restaurant called The Pub.

Q Is that in New York City?

A Yes, at 11 Broadway.

Q Did you have a conversation with Mr. Deutsch

at that time?

A Yes.

MR. BLOCK: Subject to connection, your Honor.

THE COURT: Yes, so far as Mr. Cohen and Mr. Duboff are concerned.

A I was introduced to Mr. Deutsch principally and hopefully to get involved with Mr. Deutsch in the trading of the stocks that he had an interest in, and we had a drink together and then Mr. Deutsch said that he would at some time in the future contact me.

Q Do you know a Mr. Stanley Duboff?

A Yes, sir.

Q Do you see Mr. Duboff in the courtroom today?

A Yes.

MR. ROBSON: Conceded.

THE COURT: That is conceded as well.

Q Approximately when did you meet Mr. Duboff?

A I met him a short time after I met Mr. Deutsch, to the best of my knowledge.

Q That would be some time in 1968, middle of '68?

A Yes, yes, a short time after.

Q Do you know by whom Mr. Duboff and Mr. Deutsch

were employed at that time?

A Yes, sir, by Jaffee & Company.

Q What type of company is Jaffee & Company?

A Jaffee & Company at the time held a very pretigious position in the securities market. They were a member firm and they cleared through Loeb, Rhoades & Company and they were noted for their ability to get involved in, supposedly, at the time good situations and they were a very strong financial house, had very strong buying power.

Q Are you familiar with a company called Richard Packing Company?

A Yes, sir.

Q How are you familiar with that company?

A Well, I received a call, I believe, to the best of my knowledge, since it is going back many years ago, from, I believe, Mr. Duboff, who informed me this was one of the stocks he wanted me to trade and to make an active market in. I believe it was by telephone that I received this call and --

Q Did Mr. Duboff say anything else during the course of this conversation?

A He said, primarily, to trade the stock and whatever does happen in the situation, to reflect to him.

In other words, whatever I do in the stock, whatever is shown to me, in turn to reflect to him.

Q Was anything else said in that conversation by yourself or Mr. Duboff?

A Principally, that Mr. Duboff would be an interested buyer of the stock.

Q That would be of Richard Packing?

A Yes, sir.

MR. FEFFER: May I pass to the jury copies of Government's Exhibit 50, your Honor?

THE COUPT: Yes.

Q You used the term "reflect to him." What do you mean by that?

A Well, since Mr. Duboff had asked me to get into the stock, by reflecting to him I mean whatever I saw in the stock, the buy or sell side, to make him aware of what was going on.

Q Do you have a copy in front of you of the chart marked Government's Exhibit 50?

A Yes, sir.

Q I am going to refer you to the column "Source of Stock" on page 1, and I think you see the name V.F. Maddeo appearing at the bottom, on the left hand column --

A Yes.

Q And I would like you to keep following the "Source of Stock" column through on sheet one, sheet tw, sheet three.

A Yes, sir.

Q That chart is in evidence and it relates to sales by V.F. Naddeo of Richard Packing stock to Jaffee & Company?

A Yes, sir.

Q And I would like to ask you some questions with respect to those sales.

A Right, sir.

Q Who did you speak with or deal with at Jaffee & Company in connection with the sales of Richard Packing stock that you made to them as reflected on Government's Exhibit 50?

A Most of the time I --

MR. SEGAL: Objection, your Honor. I think this witness should establish first that he did.

THE COURT: I think that is a fair request.

Q Did you speak with individuals at Jaffee with respect to the trades that are reflected on that chart?

A Yes, sir.

Q With whom did you speak?

A Both with Mr. Duboff and Mr. Deutsch -- most of the time I dealt with Mr. Duboff.

Q Will you describe for the Court and jury the method in which, the manner in which these sales were made by V.F. Naddeo to Jaffee & Company? Keep it as simple as you can so that we can all understand it.

MR. ROBSON: If your Honor please, unless there is testimony that every single trade was made in exactly the same manner, I would object to the question.

THE COURT: Well, let's find that out, because if they were not, we may have to take it on an individual basis.

MR. FEFFER: I think the witness will categorize two basic methods, your Honor.

THE COURT: On that supposition, I will let you proceed. I am aware of Mr. Robson's objection, but I will let you proceed.

MR. BLOCK: This is subject to connection as far as Mr. Cohen is concerned, your Honor?

THE COURT: It is.

Q Go ahead.

A We worked this in two ways, basically. In other words, the way I furnished the stock to Jaffee & Company. The first way was that we would receive a bid

for stock from Jaffee & Company, either Mr. Duboff or Mr. Deutsch. The first way, we would receive a bid from Mr. Duboff or Mr. Deutsch, and, for argument's sake, if the market was 37-40, I might have had a 37-1/2 bid for Mr. Duboff, say, 1,000 shares of stock and, in turn, he would inform me as to where the stock was for sale, and we, in turn, would contact that house and ask them if they had stock for sale, and they, in turn, would sell it to us and we, in turn, sold it to them.

In some cases we were directed by them; in other cases I also had orders from Mr. Duboff, and, again, Mr. Deutsch, and I made my market accordingly. In other words, I would say forty, fifty percent of the time have been directed, and the balance of the time by maintaining a high bid in the stock against the bid that was given to me, again, to, if you wish, I will explain it --

Q Let me stop you and try to go back to the two basic ways. The first way, can you repeat that, and stay with the first way first so we can all comprehend it.

A The first way was where we had received a bid. In other words, if the market was 37 - 40, I might have received a 37-1/2 bid from Jaffee and been directed to another person --

Q Who would direct you to go to this other house?

A Mr. Duboff -- basically, it was mostly Mr. Duboff.

Q You would call the other house and what would happen?

A I would ask them if they had stock for sale, or the house would call us and sell us the stock and I, in turn, would sell it to Jaffee & Company.

Q Can you tell the Court and jury the second way?

A The second way was that we were given a bid, whether it was, for argument's sake, hypothetically speaking, 37-40, and let's assume we had a 38 bid in hand for a thousand shares of stock. My competitors, I would say, were approximately 37-40 or 36-40, and I would raise my bid according to the bid given to me, I would go 37-1/2, 40-1/2 and keep a top bid.

V. F. Naddeo being one of the top firms in the Street, at the time the competition that was trading stock, we would get the primary call over the other house and if there was a seller in the stock, I would have a very, very good chance of locating the seller and, in turn, I would reflect to these gentlemen what was being offered to me at theprice and sell it to them.

Q Were there times when you received orders from other brokers to sell you Richard Packing stock?

A Other brokers selling me stock?

Q Yes.

A Yes.

Q What would you do on those occasions, when you received orders?

A If I didn't have a particular order in hand, I would reflect what was being offered to me to Mr. Duboff or Mr. Deutsch.

Q Are you familiar with a brokerage firm, or were you, by the name of Kelly, Andrews & Bradley?

A Yes, sir.

Q Did you have any business with Kelly, Andrews & Bradley?

A Yes, sir. We did quite a bit of business with them.

Q Who did you deal with at Kelly, Andrews & Bradley?

A Bernie Shwidock.

Q What was the nature of your business with Kelly, Andrews & Bradley with respect to Richard Packing, as far as you can recall?

A Again, in many cases, the orders were directed in to us from Kelly, Andrews & Bradley.

Q Can you explain that?

A In other words, Jaffee & Company would give me a bid, say, 37-1/2, and say to go to Kelly, Andrews & Bradley and we could purchase it at 37-1/4, and we would call them or they would call us.

Q How many stocks were you trading in 1969?

A I was trading, myself, 110 stocks, with two assistants.

Q How many orders per day did you execute, would you estimate?

A Approximately 600 orders per day.

Q Approximately how many brokers did you speak with each day on the telephone?

A A minimum of a hundred, if not more.

Q Did you ever receive orders from other brokers to purchase stock, who, in turn, directed you to a certain brokerage house so that you could make that purchase of stock?

A No, sir.

MR. SEGAL: Objection, your Honor.

THE COURT: He has answered the question. I will let it stand.

Q Did there come a time when you stopped trading Richard Packing stock?

A Yes, sir.

Q Do you recall approximately when this was?

A It was the latter part of '69, I believe.

Q I direct your attention to the last time V. F. Naddeo appears under "Source of Stock" in Government's Exhibit 50, I believe, and that is October 24, 1969, if I am correct.

Did you have a conversation with Mr. Duboff at or about that time?

A Well, Mr. Duboff and I --

Q Just answer the question.

Did you have a telephone conversation with Mr. Duboff at about that time?

A Yes, sir.

Q Can you tell the Court and jury during that conversation what you said to Mr. Duboff and what Mr. Duboff said to you?

A To the best of my knowledge, Mr. Duboff and I did not see eye to eye in the trading of the stock and he felt that when I did not have an order that I was moving the market around to my feel as a trader, rather than maintaining the market he wanted me to maintain in the stock.

Q These were times when you did not have an order from Mr. Duboff to purchase stock; correct?

Q These were times when you did not have an order from Mr. Duboff to purchase stock; correct?

A Correct.

He became very hot with me and started to yell over the phone, and all this, and it was at that point I just couldn't cope with it and we started to argue and we were yelling back and forth, and I was, again, at the time, trading 110 stocks. I was very, very busy.

And I said, "All right, fine, that is it. I am dropping the stock."

MR. FEFFER: No further questions, your Honor.

THE COURT: Mr. Block?

MR. BLOCK: No questions.

MR. SEGAL: Your Honor, may we come to the side bar?

THE COURT: Yes.

(At the side bar.)

MR. SEGAL: Your Honor, we are handed, just before this witness gets on the stand, 3500 material, one item consisting of about fifteen pages, two pages for another item, three pages for another.

THE COURT: Twenty pages.

MR. SEGAL: This witness gets up there and vomits all over everyone, and then, in this period of time, we

2 elmch *****

Monday morning at 9:30 a.m.

THE WITNESS: Yes, sir.

(The witness leaves the stand.)

THE COURT: Ladies and gentlemen, the parties have reached a stipulation. Mr. Robson is going to read it to you. The stipulation is that if Mr. Giasafakis were recalled to testify, he would testify to certain additional things. Those additional things are now going to be read by Mr. Robson.

MR. ROBSON: In my best voice.

It was the usual and customary procedure at programs for securities analysts and portfolio managers to be advised generally as to the float of each securities issue recommended by the securities analyst and purchased by the portfolio manager. This is an item of information which I felt at the time is generally desirable in order to formulate investment recommendations and investment decisions as to securities held in the portfolio of a Fund.

In view of the foregoing, I feel that it was a generally known fact to persons in the investment division of programs who were responsible for making investment decisions and investment recommendations what the approximate float of the stock of the companies named was, and the

A Excuse me, sir. I lost you.

Q How could you assure to yourself as a trader your obtaining the lowest possible stock at the lowest possible price if you had, say, 500, 1,000, or 10,000 share transaction? How would you attempt, yourself, not to drive the price of the stock up so you can continue to get it at a low price?

A Well, the only way you can do that, if I follow you correctly, sir --

Q Let me make it very clear.

You have got an order for a large block of stock -

A to buy?

Q To buy.

You have a customer waiting to buy, say, 3,000 shares of stock.

A Fine.

Q If you reach out into the market to pick up those 3,000 shares, you have got to be careful that you don't start bidding against yourself in making the purchase of the stock, isn't that right?

A Quite right; correct, sir.

Q It is true in your market place that the more anybody thinks you want the stock, the more they are going to ask for it; isn't that right?

Q You were anxious to obtain business from Jaffee & Company, weren't you?

A Yes, sir.

Q Jaffee & Company was a fairly solid house with a good financial and trading standard, is that correct?

A At that time they had an excellent reputation.

Q As you know, Jaffee & Company was an investment brokerage house, wasn't it?

A Yes, sir.

Q They didn't trade in stocks necessarily like your firm did?

A That's right, sir.

Q You were peculiarly, that is V.F. Naddeo was, was the kind of vehicle that Jafee would use if it wanted to purchase or buy stock?

A Right, sir.

Q And that is essentially what the function of Naddeo is for firms like Jaffee & Company, isn't that right?

A Not really, sir, not in that respect. Because the type of business we did with Jaffee & Company was a different kind of business than the ordinary business that I did. In other words, Jaffee was a big outlet. There they were a very strong financial type house. They had a

very, very big buying. Most of my trading was as the expression we use, done off the seat of my pants. But with Jaffee I worked with Stan and Bernie, that they had a definite axe to grind in their stocks. This is where it wasn't like the ordinary trading because, I don't know if the jury or -- I guess you can, can appreciate what goes on in the trading room. And in the days of '68 - '69, it was -- I was dealing with -- I'd say assistants and we were writing as many as 600 tickets a day.

The type of business I did with Jaffee was not the same kind of business I did with other firms. They would come in and ask for quotations and some would say what was the market in ABC. Merrill, Lynch is asking 10-1/2 they want to buy 1,000 or sell 500. But here again with Jaffee & Company, it was a type of thing what they had their axe to grind in this particular stock. That was the difference.

Q In other words, Jaffee & Company was a powerful enough organization so that it could go into any other house and it could say "I want to buy 'X' number of shares at this price," is that right?

A Which they did.

Q And that was accepted in the Street, wasn't it?

A Oh, yes. If they wanted to buy stock.

Q It would be different if you were dealing with me as the A&P rather than the owners of a little corner grocery store, is that correct?

A In other words, dealing --

Q Dealing with Jaffee & Company would be equivalent to dealing with A&P?

A Yes. They were considered to be one of the finer houses at the time.

Q And they had a large buying power, is that right?

A Yes, sir.

Q And like A&P I could come to you and say "I want to buy 3,000 steaks at this price" and you would listen to me a little more than you might if I were the corner grocery store and say I wanted to buy ten steaks at this price, is that correct?

A It's not that simple, because in our business ten steaks would get you in a lot of trouble.

Q At any rate, the analogy is fairly accurate, in terms of dealing with A&P or dealing with the corner grocery?

A They were a good firm, a solid form and had a good name and good reputation.

Q As a matter of fact, you in purchasing Richard Packing stock for V.F. Naddeo did deal with a number of firms, did you not?

A Yes,sir.

Q Do you recall that at different times -- let's go to 1969. You purchased stock, did you not, from Hornblower, Weeks; we're talking about Richard Packing stock?

A Sir, I haven't looked at the records. I really would have to say to you to the best of my knowledge I really couldn't give you a fair answer, but I don't know. It's going back a long period of time.

Q Haven't you looked at your records to determine where else besides thos areas that you testified to you bought stock?

A Yes. I mean I remember vaguely. If you pick out a particular time and say did you do on such and such --

Q I'm talking about generally in 1969 -- or 1968, and I'm talking about not a particular day, but I'm talking about your sources of stock, the stock that you bought for the account of V.F. Naddeo in order to sell to your customers. I'm asking you during that period of time, '68, '69, you bought Richard Packing stock, if you recall, from Hornblower, Weeks?

A To say I recall at this particular time would be erroneous and unfair. But if the record so indicates, then I did buy it from them.

Q How about Bache?

A I dealt with all the big houses and I would say there was a possibility of buying from Bache.

Q How about Rothchild?

A Possibility.

Q And Blair?

A Yes, sir.

Q You don't have any recollection at all of having purchases Richard Packing stock from those companies during 1968 or 1969?

A Vaguely, but whether --

Q When you came here earlier you had a very clear recollection,did you not, of having purchase stock from Kelly, Andrews & Bradley?

A Yes, sir.

Q Do you know how much stock you purchased from Kelly, Andrews & Bradley of Richard Packing?

MR. FEFFER: Objection -- withdrawn.

A I remember one transaction with them was for 3,000 shares, which was a direct order.

Q Do you remember any other transaction with Kelly, Andrews & Bradley? Richard Packing stock?

A Offhand, I would say no, sir.

Q Isn't it a fact that beside that one transaction there was none?

A I said that offhand, I don't recall.

Q You don't recall there was anything more than that 3,000 share purchase, isn't that correct?

A That's right.

Q And that was the only one that was made from Kelly, Andrews & Bradley by V.F. Naddeo?

MR. FEFFER: Objection, your Honor. Asked and answered.

THE COURT: Sustained.

MR. SEGAL: I just want to make it clear --

THE COURT: I think it is very clear.

Q You recall that transaction?

A Yes.

Q You recall that because it was called to your attention, isn't that correct?

A Correct.

Q In the course of your preparation for your testimony did you not think it was pertinent to determine whether or not any other stock of Richard Packing had been bought from other houses?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

MR. FEFFER: Your Honor, that is in evidence here.

MR. SEGAL: That is not in evidence, your Honor.

MR. FEFFER: Your Honor, it is on the chart that he looked at.

Q Nobody directed any orders, as you call it, from Blair, did they, or Rothschild, did they?

MR. FEFFER: Objection to the form, your Honor.

MR. SEGAL: I will rephrase the question, your Honor.

THE COURT: Very well.

Q Do you remember buying stock from Scheinman Hockstein?

A Offhand, I would say vaguely.

Q We are talking about Richard Packing.

A Vaguely.

Q Josephthal?

A Vaguely.

Q Peabody?

A Vaguely.

Q Were you directed, so called, to those firms to pick up that stock?

A I would say no, sir.

Q How about New York Hanseatic?

A No, sir.

Q Goodbody?

A No, sir.

Q Pressman, Froelich?

A Pressman, I think we did some business.

MR. FEFFER: Could we have the question, your Honor? I'm not sure --

Q Did you purchase stock from Pressman, Froelich, New York Hanseatic, Richard Packing stock?

A If the record indicates that, then I did.

Q Were those purchases, as you call it, directed?

A No, not all of those purchases.

Q Were any of those? Just Kelly, Andrews & Bradley, that's the one that sticks in your mind?

A Offhand it does, yes, sir.

Q Were you dealing in Richard Packing stock before you met Mr. Deutsch and Mr. Duboff?

A No, sir.

Q You had never purchased any of this Richard Packing stock before?

A No, sir. The only time I became acquainted with the situation was after I met Mr. Deutsch and Mr. Duboff.

Q I assume all of them were not present on all of the occasions that you came?

A That's right.

Q Do you recall ever stating to anyone with regard to Mr. Deutsch and Mr. Duboff that they were not directing trades, they mostly bought? Do you remember making a statement like that to anyone?

A Gee, I don't recall. They were --

Q I show you Government's Exhibit 3517, given to us by the Government pursuant to statute, and I point to the second full paragraph, an interview of November 9, 1973, and I call your attention to some writing there and ask you if after reading that it refreshes your recollection that you stated to an interviewer with regard to Mr. Deutsch and Mr. Duboff that they were not directing trades, they mostly bought?

Does that refresh your recollection?

Q Do you recall making that statement?

A Yes, sir, I made it, but I don't remember the question that was asked of me at the time.

Q It is clear, is it not, that Jaffee did not make a market in stocks, didn't trade stocks?

A To the best of my knowledge, they didn't trade stocks.

5 rmmch Mazzeo-cross

Q The trading of stocks was not a part of their business but, rather, firms such as V. F. Naddeo, your firm, were firms that outfits like Jaffee would use if they wanted to purchase or sell stocks, isn't that correct?

A I would say so.

MR. SEGAL: I have no further questions, your Honor.

THE COURT: Mr. Robson.

CROSS-EXAMINATION

BY MR. ROBSON:

Q Mr. Mazzeo, you first met Mr. Deutsch and Mr. Duboff back in 1968; is that correct?

A Yes, sir.

Q And you have not had any contact with them since that time, even while you were working with them, except by telephone?

A That's right, sir.

Q In other words, you were not socially friendly with them or even friendly on a business basis; you just dealt with them over the telephone in handling their orders, isn't that correct?

A That is basically it, sir.

Q You sought out the meeting with Mr. Deutsch and

Mr. Duboff back in 1968 because you wanted business with them, isn't that correct?

A It was a good firm, sir, and I wanted to do some of their business.

Q You sought them out; you were looking for business from them. Is that correct?

A Yes, sir.

Q And you got business from them; is that correct?

A Yes, sir.

Q A substantial amount of business over a period of about a year; is that not true?

A How substantial it was, I really don't recall, but I did do business for them.

Q Do you have any idea how much money you made as a result of your dealing with them?

A Richard Packing, I think I made about $2,000 on the whole deal.

Q On the whole deal?

A On Richard Packing. When you take out of it the clerances and the taxes -- there was about $14,000 gross money, and clearances and taxes, if I made $2,000 on that, it was a lot of money, on Richard Packing.

Q And that was because you were getting Richard Packing at the lowest price you could get in the market and

selling it to Jaffee & Company for a very small markup; is that correct?

A If I was making a quarter of a point on it, something like that -- maybe sometimes less, but mostly a quarter of a point.

Q And you were getting it at the lowest possible price and selling it to them at a quarter of a point above what you --

A The price I was able to get the stock at, I would in turn reflect it in some cases to Mr. Duboff and tell him I could purchase at this price, and he would give me, say, a quarter of a point on it.

Q You were always trying to get the best price, the lowest price?

A I would negotiate -- in some cases, yes, and in some cases, no.

If I had an order -- it depended on what the Street was making the stock, also. In other words, what my competitors were trading the stock. Not to have them go to my competitors --

Q I am not trying to get complicated and confuse you.

As a trader, your business was to get the best price you could get, when you were buying, depending on

what was going on on the Street?

A Right.

Q You did that in all cases with Richard Packing stock?

A Not in all cases.

Q Sometimes you paid more than you had to pay?

A It depended on the price of the stock, whatever bid I had in hand.

At times I had a certain bid in hand and wanted to maintain a certain market against that bid in order to buy the stock so that they would not go to my competitors. If there was 40 bid and the market is 40-43, I might have bid 40-1/2 or 40-1/4 for stock, and in that case I am not getting the cheapest price.

Do you follow me?

Q You would get the cheapest price you could get, but in order to get stock shown to you or offered to you you had to offer a little more?

A I had a bid --

Q A little more?

A At times, right, sir.

Q Why did Jaffee & Company need V. F. Naddeo? Why did they do business with you rather than by directly --

MR. FEFFER: I think he is asking the wrong

person, your Honor.

I object to that.

THE COURT: Let's find out if he knows.

Do you know why they came to you or needed you?

THE WITNESS: I was introduced to Mr. Deutsch --

Q I am not asking you how you got to meet them. I am asking why they needed V. F. Naddeo to do business with --

THE COURT: I think the form might be changed.

MR. ROBSON: I will rephrase it, your Honor.

Q Why didn't Jaffee & Company go out directly and buy stock for their customers, if --

A I think from past experience, people just don't like to show their hand. That could be one reason.

Jaffee wanted to use the firm of Naddeo because of our reputation, wanted a pretigious firm, and therefore we would have access to getting a call from a seller from other houses, and also to be able to, I guess, not -- by them not going around the Street, they would not divulge their position as buyers, in some cases.

Q In other words, if they had large orders to buy for customers and they started making telephone calls all over Wall Street to see if they could find buyers, that would push the price up?

A In some cases it would, sir.

Q Particularly with a company like Jaffee, which was known as a strong house, closely associated with stocks; right?

A Yes, sir.

Q So when they used a trading firm like V. F. Naddeo, their main concern was with keeping the price down?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q By using V. F. Naddeo, they were able to keep the price down when they had a large order?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q Did you have any conversations with Mr. Deutsch and Mr. Duboff about what they wanted you to do in connection with acquiring stock for them?

A Well, they would give me a bid, in some cases --

Q No, I am talking about initially, when you first discussed it with them.

A To maintain a market and keep them informed of any sell orders that I saw in the stock, since they were principally buyers.

Q Was there any discussion with them about their

substantial interest in stock and the desire to keep the price down?

A Not really. Not really.

Basically, the only way -- in other words, I worked against the bids, in most cases, and whatever I saw, I would reflect to them.

Q When you say you "reflected," what you mean is when somebody offered to sell you stock, you would give them an opportunity to buy it, Jaffee & Company to buy it?

A Right. If a thousand shares were offered at 30, I would tie up the offering and, in turn, I would contact the gentlemen and tell them I could purchase a thousand shares at 30 from Merrill, or whatever it is, and they would say, "Okay, we will take it off your hands for 30."

THE COURT: That is what you mean by reflecting the stock?

THE WITNESS: Right, sir.

THE COURT: In other words, you would communicate this information to them?

THE WITNESS: Right, sir.

Q There were times, were there not, when you sold stock to Jaffee & Company at times when you did not have

Q Was there any conversation in the course of which this price was arrived at? Did they ask you, for example, what the markets were on that day in that stock, before they gave you a bid?

A Tell you the truth, they were well aware of the market, because when Jaffee got involved they knew their situation. They didn't need me to tell them the market. They knew the market.

They are very astute individuals. They were professionals all the way.

Q Did your check of the markets verify generally what their understanding of the market was when they gave you a bid?

A At times I would have the market checked, but not always, because I was just too busy. It was impossible.

I had my assistant check the market. They would come back and maybe check a couple of competitors.

Q Were they invariably correct in what their estimate of the market was?

A I would say most of the time they were.

Q You talked about a bid and an offer; the bid being what you are willing to buy for and the offer being what somebody is willing to sell for, and there is also

that is known as a spread, which is the difference between the bid and the offer, is that right?

A Right, sir.

Q In other words, you will say to the world at large that you are willing to buy a hundred shares at 39, but you will sell it at 42; right?

A Right.

Q And the other brokers are saying the same thing to you, that they will buy at 39 and sell at 42; is that right?

A Right, but not necessarily all the time. It's a negotiated market.

Q Different prices, but there is also a bid and an offer from each broker.

Now, when you buy stock, you can buy from someone at his offering price; is that correct?

A Of course.

Q Or you could negotiate, is that not correct?

A Right.

Q And if you are in there with a bid which is slightly higher than everybody else's bid, that may enable you to get a substantial amount of stock above the offer; is that right?

A Yes.

Q So it enables you to buy the stock at a lower price than somebody who just goes out and tries to buy whatever is being offered, is that right?

A Right.

Q That was one of the functions that V. F. Naddeo served for customers in general and Jaffee in particular; is that right?

A Right, sir, in this case.

Q In other words, you were able to buy close to the bid price, whereas Jaffee, if they had gone out in the market, would have had to pay the offering price; is that right?

A Right, sir.

Q If the bid and offering spread were 39-42, you might be able to get it for Jaffee at 39-1/2 or 39-3/4, whereas if they went out to buy it, they would have had to pay 42; is that right?

MR. FEFFER: Objection, your Honor. It calls for speculation on the part of the witness.

THE COURT: I think it does.

MR. ROBSON: We are using this as a hypothetical. We have been talking very generally because the witness can't specify any particular transaction.

MR. FEFFER: I have no objection if the witness

knows that Jaffee could have gotten stock at a certain price. If he knows that, fine.

THE COURT: Let's have another question.

MR. ROBSON: I don't know that we have an answer to that one.

THE COURT: I don't know that we have a pending question.

MR. ROBSON: There was. He started to answer, but he was interrupted.

THE COURT: Would you read back the last pending question and the portion of the answer found in the record and I will ask the witness to complete his answer.

(Record read.)

A That's right. I could have gotten it for them cheaper.

Q Getting back for a moment to the question of directed trades, were you doing anything illegal as you understood it, in accepting information as to where stock was available?

A No, sir, I didn't believe I was doing anything illegal.

Q Do you believe now that you were doing anything illegal then?

A No, sir. Because when I bought I had a business deal with these people. This is what I was supposed to do. I bought stock, I sold sotck to them and that was it. That's all I did.

Q It is not unusual, on the Street, as a matter of fact, isn't it a common practice on the Street where a broker's firm that is not a trading house, doesn't make a market in a stock, learns about stock being availabe and it has a customer for that stock, it will suggest that the transaction take place with a trading house? Is that not a customary practice?

A Not really, sir. It was never really done with me. The only reason I had it was because of the orders I maintained on the other end.

Q Whether it was done with you, generally speaking on Wall Street, would one brokerage firm looking to buy stock for a customer buy it directly from another brokerage firm that was looking to sell for a customer, when neither of them were trading that stock?

A Really, I don't know. I don't think it is for me to answer something what another brokerage firm would be doing and how they do business.

Q What I'm trying to ascertain from you is

whether or not it was not the common practice on Wall Street for brokerage firms looking to purchase or sell for custor rs to buy it through a trading house rather than to try to locate or buy or sell it from another brokerage house.

MR. FEFFER: Objected to. That has been asked.

THE COURT: Yes. I thought he said he didn't know what the other brokerage houses do. If you can answer it better, go ahead.

THE WITNESS: Other times houses come to you and say, look, we are an interested buyer and we do this on a daily practice. We will reflect our bids to other houses in the Street. In other words, let's assume Jaffee was an interested buyer of ABC, I would get my assistants to look at the market and hit many of the member firms and say, "Look, we're interested buyers in these particular stocks, if you have anything for sale we are interested in purchasing some"and we would reflect the bid to them.

Q That was the common practice, wasn't it?

A Yes.

Q That the trading house was using as the middle man between buyers and sellers, no matter who knew

what?

A Whatever other people did was their business. All I know, for argument's sake, if a guy comes to me and says "I'm a buyer of ABC" and many times we get orders today, we do the same thing. We reflect to different houses our bids that we are looking for stock or we are interested sellers, do they have any bids.

Q When you deal with a large Wall Street firm like Kuhn, Loeb or L.F. Rothschild and you buy or sell stock to them, you deal with an order room, do you not, rather than with a registered representative?

A Yes, you deal with the order clerk or the trader, whatever is his position over there.

Q And the trader in those firms is just executing orders sent to him by the registered representatives, is that not right?

A I would say so, sir.

Q So that really, if a registered representative had stock to sell on behalf of a customer, the trader would have no real knowledge one way or the other, you would have to deal with him directly, would you not?

A Yes. Either the trader would come in and he would ask you your market and if he was a buyer he would bid you or if he was a seller he would sell you or

negotiate in between, whatever you had to do.

Q If you say a trade was directed, what you really mean is that Mr. Deutsch and Mr. Duboff on occasion told you that they knew that a particular brokerage firm had some stock to sell, is that not correct?

A That's not correct. In some instances they said that you're purchasing this number of shares of stock. I remember one particular one with --

Q With Kelly, Andrews & Bradley?

A Right. You're purchasing 3,000 or whatever--

Q Forgetting the Kelly, Andrews & Bradley transaction for a moment, that one sale that you're talking about. With respect to the others, isn't that what you mean when you said they directed you, that they told you that brokerage firms had stock available?

A Right, sir.

Q And you would call the order room at the brokerage firm and say I understand you have some stock for sale?

A And I would show him a bid or they would call us reflecting a price to us.

Q And the negotiations with this order room were the same negotiations that you would have with anybody, is that correct?

MR. FEFFER: Objection. The negotiations with which order room?

Q The order room of the firm from which he got the so called directed --

MR. FEFFER: That is incorrect, your Honor. The directions came from Jaffee --

MR. ROBSON: OBjection, your Honor. If he has an objection, he can object.

THE COURT: There is an objection to the form of the question based on the current state of the record. That objection is sustained. Ask a new question, please.

Q You testified that when you dealt with one of the firms where you got a directed order, you would deal with somebody in the order room, is that correct?

A That's correct, sir.

Q And when you dealt with that person in the order room, did you not negotiate the price with him in the same manner as you would have negotiated the price if you hadn't been told that there was some stock available at that brokerage firm?

A I would go in and show my bid. I would tell him I am a 22 or whatever buyer of two or three thousand sharess of stock and that is how I did business.

Q You would do the same thing no matter how you

learned about the brokerage firm.

A It would be along the same lines, sir.

MR. ROBSON: Does your Honor --

THE COURT: I assume you are almost finished with your cross examination. If you plan to be a long time--

MR. ROBSON: I don't plan to be a long time, but I plan to be possible fifteen or twenty minutes and I would appreciate a five-minute recess which would reduce that fifteen or twenty to ten.

THE COURT: Very well. If you request it, I will grant it. We will take our mid-morning recess now, ladies and gentlemen, and I would ask that you not discuss the case among yourselves in the jury room and keep an open mind on all phases of the case. You are excused. Counsel are excused as well.

(Jury left the courtroom.)

(recess taken.)

at time in Richard Packing Company stock?

A Yes, I believe there is a short position over here, on April 1st.

Q April 1, 1969?

A Reading the trading ledger here is not one of my best facets of the business, and this was all back office stuff, but we used to keep a running position and it is difficult to tell you, but I believe a short position did exist on April 1st, a position of 1,790 shares short, if this is correct.

Q Didn't that short position then increase to 3,350 on April 3rd --

A 3,390.

Q On April 4th it was down to 3,240.

A Right, sir.

Q On April 4, 1969 you had sold 3,240 shares of stock without having any shares to deliver?

A Yes, sir.

Q Where did you cover that short from, where did you get that 3,000 shares of stock?

A The 3,000 shares of stock was purchased on April 4th from Kelly, Andrews & Bradley, according to thse records.

Q In other words, the so called directed trade

was a trade that was arranged so that you could cover your short position without being hurt?

A That's right.

Q And that is the only directed trade that there was, so far as you can recall, in Richard Packing Company stock, is that correct?

A I believe there were others also, but to the extent, I don't know -- this one here I recall, I remember that 3,000 shares.

Q As you sit here now, you can only recall one directed trade, is that correct? The one from Kelly, Andrews & Bradley?

A Right, sir.

MR. FEFFER: Object, your Honor: One specific trade.

Q One specific directed trade in Richard Packing, that is the only one you can recall?

A Offhand, yes, sir.

Q That trade was accomplished so you could cover a short position, is that correct?

A Well, that --

Q Is that correct?

A I would like to elaborate on that point.

THE COURT: Can you answer it yes or no, or

can't you answer it yes or no? If you can, do so, if you can't, say so.

THE WITNESS: Yes, sir, to cover my short.

Q And Jaffee & Company, if they had wanted to, could have bought that stock directly from Kelly, Andrews & Bradley, is that not correct?

A If Kelly, Andrews & Bradley was in the sheets, I assume that they could have bought it directly from them.

Q The fact is, the record shows Kelly, Andrews & Bradley was in the sheets at that time, which means Jaffee could have bought this directly from them?

A That's right.

Q But they arranged for you to buy it so you wouldn't be hurt with your short position?

A Well, the only reason I shorted the stock was because they wanted it. I shorted on their instruction. That is the point I wanted to bring out.

Q They didn't want you to be hurt (--

A Forget about being hurt. I shorted it because they asked me to. I have no reason to short 3,300 shares of stock of Richard Packing at that price.

Q And they didn't want you to get hurt?

A Well, to whom did I sell the stock?

Q You answer my questions. You are the witness

was out there, John Stevens & Company.

Q From time to time you got requests or offers from various brokerage houses, including ones in Minneapolis, to sell stock in Richard Packing which you showed to Mr. Deutsch and Mr. Duboff, right?

A I would say so, yes, sir.

Q Did they take evrything you showed them?

A Not everything. Not in all cases. Most of the time they did, sir.

Q Would you try to limit yourself to answering my question and not adding on?

THE COURT: If you want an answer stricken as not responsive you may ask, but don't give directions to the witness.

MR. ROBSON: Will your Honor direct the witness to limit his answers to my questions and ask him not to add on?

THE COURT: I would appreciate it if you answer the questions to the best of your ability and don't volunteer.

Q They did not buy all of the stock, is that correct --

MR. FEFFER: Objection. Is Mr. Robson now testifying?

THE COURT: He is trying to restate an answer. If you want it restated, I will have the question and answer read, if you like?

MR. ROBSON: I think what I am asking is proper, your Honor.

THE COURT: I don't recall the answer having been quite in the same form, do you? But restate your question.

Q Did Jaffee & Company buy all of the Richard Packing stock which you showed them?

A No, sir.

Q When they did buy stock you showed them, did they negotiate the price at all with you?

A At times they did and at times they did not.

Q When they did, did they seem to pay less than what the offer was you had gotten from the other firm?

A Again, it depended. I can't give you a yes or no answer on that. It depended on the situation.

Q Were there times when they suggested they would be willing to buy it, but at a lower price?

A Yes, sir.

Q There came a time when you had a falling out with Messrs. Deutsch and Duboff, is that correct?

A Yes, sir, we did.

Q You stopped doing business with them, is that correct?

A Right, sir.

Q Wasn't that falling out because of the fact that you were charging them too much of an increase when you sold them stock which you had acquired?

A Mr. Robson, if my records --

Q Just yes or no.

A No, sir.

Q That was not the reason?

A No, sir.

Q Were you at any time manipulating the price of the stock of Richard Packing Company?

A No, sir.

Q Were you at any time trying to push that price up?

A No, sir.

Q Did you ever have any agreement with Mr. Deutsch or Mr. Duboff that you were going to push that price up?

A No, sir.

Q Are you aware of the fact that you are named as a co-conspirator in this indictment?

A Yes, sir.

Q Did you ever agree with Mr. Deutsch or Mr. Duboff or Mr. Cohen to do anything illegal, to your knowledge?

MR. BLOCK: I object to the inclusion of Cohen. The witness has not identified Cohen.

MR. ROBSON: Okay. I threw him in because he is named --

THE COURT: The question has been withdrawn and will be restated.

Q Did you ever agree with Mr. Deutsch or Mr. Duboff to do anything illegal with respect to the stock of Richard Packing?

A No, sir.

MR. ROBSON: I have no further questions.

THE COURT: Mr. Feffer?

REDIRECT EXAMINATION

BY MR. FEFFER:

Q Mr. Mazzeo, I believe you testified that V.F. Naddeo was a trading house?

A Yes, sir.

Q And to the best of your recollection, Jaffee & Company did not perform the functions as a market maker in Richard Packing and on the stock, is that correct?

A Right, sir.

THE COURT: Just so the record is clear, I think Mr. Block is correct, there was a chart marked for identification as 45. I just want to clear it up.

I think we will make this V. F. Naddeo trading ledger, if we can, 70 in evidence.

MR. FEFFER: Your Honor, I think we should mark it 45-A, because there have been other markings done outside the courtroom.

THE COURT: All right.

I don't want two documents to bear the same designation.

(Government's Exhibit No 45 in evidence was remarked Government's Exhibit 45-A in evidence.)

Q You received an order to purchase certain shares of Richard Packing stock in April, is that correct, in connection with this short position?

A Right, sir.

Q Approximately how many shares?

A 3,000 shares.

Q Who gave you this order, to the best of your recollection?

A Mr. Duboff.

Q Were you directed to to go another house to

pick it up?

A Yes, sir.

Q And who was that?

A Kelly and Andrews.

Q Do you recall the price that Kelly, Andrews paid -- excuse me, thatyou paid, Kelly, Andrews & Bradley for the stock your purchased?

A No, sir.

Q Would that be reflected on the Government's exhibit that was introduced, Government's Exhibit 45-A?

A Yes, sir; it was purchased April 4th.

Q At what price?

A 32-7/8.

Q Do you recall what price you sold these same shares of stock to Jaffee for?

A I sold stock at 34, 1,800 at 34, and 1,200 at 32, which gave an average of 33. So I bought them back at 32-7/8 and I made an eighth of a point on the whole transaction.

Q How long after the time that you purchased these shares at Kelly, Andrews & Bradley did you turn around and deliver them to Jaffee?

A You mean the physical delivery of the stock?

Q Yes.

7 rmmch Mazzeo-redirect

A That is not --

Q How long after did you, in fact, supply or sell those shares to Jaffee?

A They were already sold to Jaffee.

Q They were already sold to Jaffee. Correct. Thank you.

THE COURT: You say two sales, one of 1,800 shares --

THE WITNESS: Yes, your Honor. One of 1,800 on April 1, 1969 at 34, and the second one was 1,200 on April 1st at 32.

Q Did Mr. Duboff ever explain why he didn't go to Kelly, Andrews & Bradley himself to pick up these shares of stock?

A No, sir.

Q By Kelly, Andrews & Bradley supplying the stock to you and you, in turn, supplying it to Jaffee --

MR. ROBSON: Your Honor, that is not an accurate statement. He didn't in turn supply it, he already had --

Q All right.

By having you, as V. F. Naddeo, injected --

MR. ROBSON: Your Honor, I object.

THE COURT: All right. You object to the form fo the question. The word "injected" is objected to and

the objection is sustained.

MR. ROBSON: I also object to the leading, your Honor.

Q Could Jaffee have gone directly to Kelly, Andrews & Bradley?

MR. SEGAL: Objection.

A Yes, sir.

MR. SEGAL: Objection. I ask that answer be stricken.

THE COURT: Overruled.

MR. SEGAL: Your Honor, this witness is being asked about what somebody else could do.

THE COURT: It is an area you and Mr. Robson inquired into. What was possible; what other brokerage houses might do.

If you want to ask a question or two when your turn comes, I will permit it.

May we have the last question and answer, please, Mr. Reporter?

(Record read.)

Q Do you recall any other short sales of this nature with Jaffee & Company?

A Offhand, it is very hard for me to determine.

Q You made reference on cross-examination that it

during the time V. F. Naddeo was trading that stock?

THE WITNESS: No, sir.

MR. SEGAL: Your Honor, at this time I would ask the Government to produce all of the books and records of trades of Richard Packing which has been effected by V. F. Naddeo unless I can get a stipulation to whom it was that they were purchasing from.

MR. FEFFER: Your Honor, those books and records have been available all day Friday --

MR. SEGAL: Your Honor, I ask that they be brought up and I would introduce them in evidence now, and that's all I would want from this witness.

THE COURT: That's all you want?

MR. SEGAL: Yes, your HOnor.

THE COURT: You don't want to ask him any questions, you just want to have them introduced?

MR. SEGAL: I want to have them introduced and I want to go down the list of names to find out whether they are large firms or prestigious firms.

THE COURT: All right. He wants them. Get them.

MR. FEFFER: There are about twenty volumes, your Honor.

THE COURT: He wants them; get them.

Q Either one.

MR. FEFFER: To save time, if Mr. Segal has actually seen trades of this type --

MR. SEGAL: Of course I have.

THE COURT: He can examine as he sees fit.

MR. FEFFER: We have no objection whatsoever as to a stipulation of that type.

MR. SEGAL: That's all I want.

THE COURT: Whatever is in the books --

MR. FEFFER: Whatever is in the books we will be happy to stipulate to.

THE COURT: That's a fair statement from both of you.

MR. SEGAL: Very well, your Honor. I have no further questions.

THE COURT: Mr. Robson?

CROSS EXAMINATION

BY MR. ROBSON:

Q Mr. Mazzeo, can you name a single firm as you sit there now to which you were directing it for the purpose of buying shares of Richard Packing other than Kelly, Andrews & Bradley?

A No, sir.

Q Were you ever directed, to the best of your

recollection, to the purchase of Richard Packing stock by Loew & Company?

A Not to my knoweldge, sir.

Q Were you ever directed, to the best of your recollection to buy stock from Bache & Company?

A No, sir, not to my knowledge.

Q Were you ever directed, to the best of your recollection to buy stock from L.F. Rotschild?

A No, sir, not to my knowledge.

Q Were you ever directed, to the best of your recollection, to buy stock from Blair & COmpany?

A Not to my knowledge.

Q WEre you ever directed, to your recollection, to buy stock from Kidder, Peabody & Company?

A Not to my knowledge.

Q Were you ever directed, to your recollection, to buy stock from Josephthal & Company?

A Not to my knowledge.

Q Were you ever directed, to thebest of your recollection, to buy stock from Paine, Webber?

A Not to my knowledge.

Q Were you ever directed to the best of your recollection to buy stock from Hertz & Company?

A Not to my knowledge.

Q Were you ever directed, to the best of your recollection, to buy stock from Scheinman, Hochstein & Trotta?

A Not to my knowledge, sir.

Q Were you ever directed, to the best of your recollection, to buy stock from Pressman, Froelich & Frost?

A Not to my knowledge.

Q Were you ever directed, to the best of your recollection, to buy stock from Allessandrini & Company?

A That could have been a possibility. That could have been a possibility.

Q Were you ever directed, to the best of your recollection, to buy stock from McKee & Company?

A Not to my knowledge.

Q Were you ever directed, to the best of your recollection to buy stock from Bayer & Company?

A Who?

THE COURT: You said Hertz before, and I thought I heard Hentz. I don't know of a Hertz, but I do know of a Hentz.

MR. EDBSON: When I said Hertz, I meant Hentz. Did you ever get any direction, to the best of your recollection, to buy stock from Hentz & Company?

A No, sir, not to my knowledge.

Q What about Boyer & Company, did you ever get any direction to buy stock from them?

A Not to my knowledge, sir.

Q What about New York Hanseatic?

A Not to my knowledge.

Q What about Shapiro?

THE COURT: Is that M.A. Shapiro?

Q M.A. Shapiro.

A No, sir, not to my knowledge.

Q What about Boetcher & Company? Were you ever directed to get any stock from them?

A Not to my knowledge.

Q Did I ask you about Loew & Company already?

A Yes, you started out with Loew.

Q What about Goodbody & Company?

A You mentioned them already.

Q You didn't get any direction from them?

A No, sir.

Q What about E.F. Hutton & Company, did you ever get any direction to buy stock from them?

A Not to my knowledge.

Q What about Hornblower, Weeks?

A Not to my knowledge.

W What about duPont & Company?

A Not to my knowledge.

Q What about Merit Investors?

A Could be a possibility there.

Q What about White, Weld, did you ever get any direction to buy from them?

A Not to my knowledge.

Q Suppose I just read a list, the question is the same with each one of them, that is, did you get any direction, I will just read them:

Reynolds --

MR. FEFFER: I'm not sure what the question is now.

MR. ROBSON: The question is, did he get any direction to acquire stock from any of these companies.

THE COURT: Do you understand it?

THE WITNESS: Yes, your Honor.

THE COURT: He is going to read you a series. You will answer the question only at the end with a yes or no. After he reads off whatever names he is going to read.

Q Reynolds?

A No.

Q Packer, Wilbur?

A No.

Q Wood, Walker?

A No.

Q E.B. Robinson?

A Not offhand.

Q C.B. Ellis?

A No, sir.

Q Weis, Voision?

A No, sir.

Q Lane Douglas?

A No, sir-

Q Graham, Loving?

A No, sir.

Q Merrill , Lynch?

A No, sir.

Q First Hanover?

A No, sir.

Q Merkin?

A No, sir.

Q Clark Dodge?

A No, sir.

Q Hirsch?

A No, sir.

Q And Walstone & Company?

A No, sir.

MR. ROBSON: Your HOnor, I would like to see

if we could have the government stipulate, these records come from the books of --

THE COURT: These names?

MR. ROBSN: These names came from the books with the purchases made from these, and I'd like to indicate for the record at this point the number of shares that were purchased from the two houses the witness identified as possibilities.

MR. FEFFER: Can I ask Mr. Robson whether he personally has seen these or whether Mr. Segal has seen these from the books?

MR. ROBSON: I have no personally seen them.

MR. SEGAL: I have not seen them, either, your Honor.

THE COURT: I would suggest this:

I think the government will be prepared to make a representation once all three of you have checked the facts out.

MR. FEFFER: That's correct, your Honor.

THE COURT: Is that satisfactory?

MR. FEFFER: Yes, your Honor.

MR. ROBSON: I'd like to be able to read to the jury under some agreement indicating the number of

shares which were involved in so called directed trades from the two brokerage houses that the witness identified as possibilities.

THE COURT: Those as I recall were Allessandrini & Company and Merit Investors. On that, gentlemen, are you prepared to look at the records together and enter into a stipulation , the essence of which will be the number of shares purchased by V.F. Naddeo and Company from Allessandrini & Company, and Merit Investors?

MR. FEFFER: Your Honor, we will stipulate to whatever the record reflects as to where Mr. Mazzeo obtained Richard Packing stock from. I am not going to limit it to those two houses or any others. But we will gladly stipulate to whatever the record reflects where V.F. Naddeo obtained shares of Richard Packing.

MR. ROBSON: The point is fairly simple --

THE COURT: I heard the point. I recognize the point. I'd suggest this:

If the government wants to put in any other listings of purchases other than these two houses for whatever purpose theywish, I will permit them to do that as well. You are asking for a stipulation relative to purchases, and as I understand it, from two houses. The number of shares purchases, is that right?

MR. SEGAL: I would want more, your Honor. I would want to indicate what all of the houses were, jsut as the government does.

MR. FEFFER: What I said.

MR. ROBSON: We have no objection to the stipulation to all the transactions.

MR. SEGAL: We will demarcate those others, is that right?

Q Mr. Mazzeo, V.F. Naddeo went into bankruptcy at some point, did it not?

A Yes, sir, in 1970.

Q Do you recall when in 1970?

A I think it was in February.

Q Were they having substantial financial difficulties for a period of time before they actually went into bankruptcy?

A It wasn't for a period of time. I understand we had a lot of back office problems that created it.

Q For how long had you been having substantial back office problems?

A That would be better for Mr. Naddeo to answer, not for me.

Q You were not aware of the fact that they were having problems for two or three months?

THE COURT: That too is conceded.

Q What is your relationship to Mr. Deutsch?

A He is my brother-in-law. I married his sister.

Q How long has he been your brother-in-law?

A Twenty-one years.

Q How long have you known Mr. Deutsch?

A Well, a little before twenty-one years, when I was going out with my wife.

MR. FEFFER: At this time, your Honor, I'd like to read two short sentences, one from Government's Exhibit 5B in evidence and one from Government's Exhibit 6 in evidence. I want to use them as a basis for asking Mr. Morginstin some questions.

THE COURT: All right.

MR. FEFFER: 5B is the offering circular of March 11th. On page 9 of the stock options and warrants.

(Mr. Feffer read to the jury from Government's Exhibits 5B and 6, in evidence.)

Q Will you tell the Court and jury, Mr. Morginstin, what valuable services you have rendered for Richard Packing Company?

A I never rendered any services, to the best of my knowledge.

Q I want to draw your attention to a chart, Mr. Morginstin, which is in evidence. It is Government's Exhibit 47 and I would like to draw your attention in particular to your name as you can see it that appears in a box, 4/3/69, 1,500 shares at $28-1/4 to Kelly, Andrews & Bradley for the account of Harry Morginstin. Do you see that?

A Yes, sir.

Q And the box below it, 4/7/69, 1,500 shares at $32-7/8 sold by Harry Morginstin to V.F. Naddeo. Do you see that?

A Yes.

Q And down here, I don't believe you can see it too well, but I can represent, if you want to come around and look at it, you are entitled to, obviously, Harry Morginstin, profit, $6,330.90.

A I see that.

Q Do you see that?

A Yes.

Q When did you open your account at Kelly, Andrews & Bradley?

A Mr. Deutsch --

Q No, first give me the time, and then I will allow you to go into an explanation, okay?

A WEll, I can't --

Q You can't answer the question, or --

A I can't answer it yes or a specific time.

Q Do you have any idea when your account was opened?

A No, sir.

Q Did you sign any account form for opening that account?

A I can't recall.

Q Have you ever heard of Kelly, Andrews & Bradley, Mr. Morginstin?

A Mr. Deutsch could have mentioned it to me, but it never remained with me. Can I explain, sir?

Q YEs, let me ask you a couple of questions and certainly you can explain. What is Kelly, Andrews & Bradley?

MR. SEGAL: Your Honor, if the witness wants to explain --

MR. FEFFER: I will ask him about that, Mr. Segal.

THE COURT: I will let the government inquire in its fashion.

Q What is Kelly, Andrews & Bradley, Mr. MOrginstin?

THE COURT: Or was?

Q Or was, I'm sorry.

A (No response.)

Q Do you have any idea what it is?

A No.

Q What did you do with the $6,330.90?

A It was probably deposited in my account.

Q You say probably?

A Everything, all my profits, everything went to my account. It was my money.

Q Did check come out of Kelly, Andrews & Bradley for you and you would endorse the back of those checks and put them in your account?

A Can I --

Q Sure.

A -- give a brief explanation? The first thing that I want you to understand, and I think I have said that before, that I do not understand the stock market. Mr. Deutsch has been -- has had power of attorney for me for over twenty years. I, being a salesman, knowing the men's field, and I do not know or do not understand the stock market, and therefore when Mr. Deutsch, I asked him to please do me a favor, that I do not want to remain a salesman for the rest of my life. I do not want to work

the house that I do work now. And being that he has the knowledge and is capable of handling the stock market for me, it would be the same thing that if I went to a doctor, I would go to a doctor for advice in the same way that I went to Mr. Deutsch for advice and gave him permission to handle all my stock transactions for me.

Many times Mr. Deutsch would call me and say, I'm buying a certain stock or I bought it for you, because I don't know one stock from the other. But he would tell me that he bought this stock, so at that time that he told me, I would have known. Two days afterwards, forgot it. I didn't enter and didn't remain in my mind.

Q What happened with the profits, that was the question? I understand all that. What happened to the profits?

A It would go back, all profits, everything went back into my account.

Q How did they get into your account?

A Either I received checks that were mailed to my house and I deposited, or whatever -- everything went back to me. It was my money. I could do whatever I wanted with it.

Q In other words, all the checks, for example, the checks from Kelly, Andrews & Bradley were mailed to you

A I don't recall.

Q You don't recall whether it was 50 or 150 thousand dollars; is that correct, the most you had in that account at one time?

A I don't recall the exact most.

Q Not the exact. I am asking you whether it was closer to 50 or closer to 150 thousand dollars.

A Could have been 150,000 dollars, too.

Q But it could have been 50,000, right?

A Yes, depending on the time. If I had more stock and I had less cash, or if I sold the stock and I got the cash for it.

Q When did you open your first account with Mr. Deutsch?

A Oh, about fifteen, twenty years ago.

Q How much money did you give him at that time?

A Somewhere between 5, 10 thousand dollars. Something around that nature.

Q How much money did you make in 1968?

MR. SEGAL: Objection.

THE COURT: Overruled.

Q How much did you make in 1968 in trading stocks, Mr. Morginstin?

A I'd have to check my income tax return.

Q What is your best recollection?

A I can't answer you intelligently.

Q Was it more than $5,000?

A I'd have to, Mr. Feffer, I'd have to check my income tax return.

Q Just try to bear with me.

Was it more than $5,000?

MR. SEGAL: I object to this as not direct examination. There is no reason to depart from the traditional direct examination of a Government witness.

THE COURT: Overruled.

Q Was it more than $5,000, Mr. Morginstin?

A You would have to show it to me, sir.

Q Was it more than $100,000?

A You would have to show it to me.

Q You have no recollection as to whether you made $5,000 or $100,000 in the stock market in 1968?

MR. SEGAL: Objection, your Honor. This is not direct examination.

THE COURT: Overruled.

A Sir, you would have to show me the income tax return; then I can answer you intelligently.

Q I am going to ask you without the benefit of your returns.

Is it your recollection now that you don't know whether you made $5,000 in 1968 or $100,000 in 1968? Is that correct?

A I can't give you--

Q You have no idea, sitting on that witness stand?

A I have to check out the return. I have to look at the return.

Q Who filled out your return for you?

A Done by the accountant.

Q Whose accountant?

A I would give Mr. -- Mr. Deutsch would hand it to me. I would give the return to Mr. Deutsch. He was my accountant all these years.

Q How many different brokerage accounts did you have in 1968 and 1969?

MR. SEGAL: Objection.

THE COURT: Sustained.

You had an account at Kelly, Andrews & Bradley in 1968 and 1969, did you not?

THE WITNESS: Your Honor, can I please explain to you, sir?

THE COURT: Yes, I'd like you to.

THE WITNESS: Thank you, sir.

Mr. Deutsch would go ahead and buy stock for me,

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MR. ROBSON: Whic is the letter where you refer to Status Marketing?

MR. FEFFER: I said Circus Wagon International, not Status Marketing. If I did, I misspoke.

MR. ROBSON: I thought he said Status Marketing.

THE COURT: The reason I am doing it is because of the examination as I heard it conducted.

MR.ROBSON: I misunderstood what this was. So far as Circus Wagon is concerned, my objection is noted.

THE COURT: Yes. As far as this document is concerned, I have ruled. Your motion or application is overruled.

(In open court)

THE COURT: You may proceed to read the stipulation indicating what I had noted at the side bar as a preface.

MR. FEFFER: Ladies and gentlemen, with respect to the stipulation that I am going to read, it's going in subject to connection as to Mr. Cohen and Mr. Duboff, and -- excuse me, as to Mr. Cohen and Mr. Deutsch. At this time it is coming in as to Mr. Duboff. It reads as follows:

"If William Harris were called to the witness stand he would testify as follows:

One. That he is 77 years of age and is presently in ill health.

Two. That he is a retired Post Office employee. For the past six years Mr. Harris' source of income has been his Post Office pension and his and his wife's Social Security benefits which came to a total of approximately $600 a month and profits from stock transactions and income from bonds.

Three. That he is the father-in-law of Stanley Duboff.

Four. That approximately 15 years ago he gave Mr. Duboff between $3,00 to $5,000 to invest for him in stocks.

Five. That Stanley Duboff has had complete discretion over what stocks to purchase for Mr. Harris and did not discuss or inform Mr. Harris as to the purchase and sale of stocks. Further, that all confirmations of sales and purchases of stock were mailed to Mr. Harris at his address.

Six. That Mr. Harris has never performed any services of any type for Richard Packing Company and/or Circus Wagon International and in fact he has never even

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heard of either of these two companies.

Seven. That a bank account has been maintained, that account in his name, that is Mr. Harris' name, in Manufacturers Hanover in which proceeds have been deposited from his stock transactions. Mr. Duboff had the authority to deposit checks in that account and to draw checks on that account in Mr. Harris' name.

Eight. That Mr. Harris never drew or signed any checks on the account in his name at Manufacturers Hanover. Mr. Harris did receive money out of this account drawn by Mr. Duboff when he needed it.

Nine. Mr. Duboff had in his possession all of the records relating to the Manufacturers Hanover checking account, including cancelled checks, blank checks, and monthly statements.

Ten. Mr. Harris maintained for his own personal use and his own personsl possession other checking accounts. Allchecks on these accounts were written and signed by Mr. Harris.

Eleven. That Mr. Harris' signature appears on Government's Exhibits 68-A and 68-C for identification."

At this time, your Honor, the government would offer 68-A and 68-C.

THE COURT: Very well. The Court notes the

SOMER JACK ROTHMAN,

called as a witness, being first duly sworn, testified as follows:

MR. FEFFER: May I inquire, your Honor?

THE COURT: You may.

MR. BLOCK: Your Honor, I hate to ask this, but I would like to approach the bench at this time.

THE COURT: Step up.

(At the side bar)

MR. BLOCK: If your Honor please, I assume from having seen Government's Exhibit 3577 that the government is going to attempt to prove through this witness that at sometime or another $200,000 was put into the New Dimensions trading account for Richard Packing Company.

According to that exhibit, the funds were co-mingled. This, it seems to me, is highly prejudicial as far as Mr. Cohen is concerned and I would ask that all testimony with respect to that $200,000 be excluded.

I might mention that the money went in -- I am not sure exactly when, but toward the beginning of New Dimensions and Cohen asked for it back and it came back to him, the whole $200,000. No trades were ever effected in New Dimensions for Richard Packing Company's

account.

Now, this witness, furthermore, it is my understanding, again from the 3500 material, never met Cohen, never had any conversations with him and in the absence of any evidence that Cohen knew that this money was being used, you know, and co-mingled at New Dimensions, I think to allow this evidence would have a devastating effect on Cohen and a very unfair effect.

MR. FEFFER: Your Honor, the Regency Hotel slip of paper, Ithink Government's Exhibit 37, if I remember correctly --

MR. BLOCK: It is 37. I checked it last night.

MR. FEFFER: That paper contains the name "Milton Cohen, 12 percent" and Mr. Hurley testified that that was, at least at one time, considered by Mr. Deutsch to be a listing of the people who would be interested to that extent in New Dimension securities. The point here, your Honor, is that $200,000 is delivered to New Dimension securities -- actually $300,000 -- in January of 1970 and it is returned gradually, over a period of time, and I think there are checks of $75,000, $25,000 -- it is returned sometime during the summer of 1970 and not one single trade is made for Mr. Cohen's

company --

MR. BLOCK: Richard Packing account.

MR. FEFFER: Richard Packing account. The government's contention is that it came in when New Dimensions was formed and it was used by the business and the government contends this money came in for one purpose and one purpose alone, and that was to assist New Dimension in getting on its feet.

Another crucial point, your Honor, is that why Mr. Cohen would suddenly give $200,000 to Stanley Ryback to trade for him and Mr. Ryback never had a day of trading securities in his life, and why he would do this when Mr. Deutsch worked at Jaffee and why he would suddenly open an account at New Dimension -- it is our contention that New Dimension securities was Mr. Deutsch and Mr. Duboff and Mr. Deutsch and Mr. Duboff, if there was going to be any trading, would be the people doing the trading.

THE COURT: How do you demonstrate that the $200,000 which came from Richard Packing Company, that that investment, payment, whatever, was known to Mr. Cohen?

MR. FEFFER: We have a check for $200,000 which we will offer in evidence that Mr. Cohen signed.

THE COURT: Made payable to New Dimensions?

MR. FEFFER: Absolutely, your Honor.

THE COURT: The objection is overruled.

MR. BLOCK: Your Honor, just to complete the record, if your Honor is going to let this in, then I move for a severence.

THE COURT: On this one, the application is denied.

MR. ROBSON: Your Honor, I think for the record, at this point, based on my objection earlier to testimony, to the chart, which was introduced earlier relating to purchases by Financial Industrial Fund, which are the only purchases in this case related at all to New Dimension securities, and my objection at that time was based on the fact that the testimony is completely silent on that fund, what it purchased, how it purchsed, or anything else, and I would therefore object also to this witness' testimony since we are now into the fifth week and there is not one word of testimony to establish any impropriety by any of the defendants with respect to the funds purchases, but certainly not one word with respect to Financial Industrial Fund whose purchases were the only purchases that came through New Dimensions.

on cross.

MR. BLOCK: We will not go into it.

MR. FEFFER: I want to make clear that the government has promised this man in connection with testimony he was going to give that he not be prosecuted. We have obtained permission from the Department of Justice to immunize him and those papers are ready, that he says he doesn't need formal immunity conferred, that he would accept the word of the United States Attorney's office that he wouldn't be prosecuted.

MR. SEGAL: I hope your Honor understands why I felt I had to come.

THE COURT: I will make a statement to the jury. With that representation by the government on the record, I gather all defense counsel have indicated to the Court they do not intend to inquire on cross-examination on this matter of immunity.

MR. SEGAL: That's correct, your Honor.

MR. BLOCK: What is your statement to the jury going to be, your Honor?

THE COURT: Only as to the propriety of the side bar conference.

(In open court)

THE COURT: Ladies and gentlemen, certain

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Q What are the responsibilities in general of a cashier?

A To see that the records are kept and that the daily work is done.

Q You refer to the records of what?

A Of any brokerage firm that a cashier is with.

Q I direct your attention to the early part of the summer of 1969.

How were you employed at that time?

A I worked for Mayflower Securities.

Q What was that firm?

A Stock brokerage firm.

Q What was your position with Mayflower?

A Assistant cashier.

Q Did you have an occasion to see or meet with Mr. Deutsch at about that same time?

A Yes.

Q To the best of your recollection, when was that?

A In the early summer of 1969.

Q Where did this meeting take place?

A In Chock Full O' Nuts, on Broadway.

THE COURT: There are a lot of Chock Full O' Nuts on Broadway. I remember there was one down just below Wall Street. Is that the one?

THE WITNESS: It was, I would say, 49 Broadway.

Q Which is somewhat below Wall Street?

A Yes.

MR. ROBSON: Your Honor, can we have the date of that meeting?

THE COURT: To the extent you can give it to us --

You indicated it was the early summer of 1969. Do you recall if that was May, June, July?

THE WITNESS: No, I don't, offhand, your Honor.

Q Did you have a conversation with Mr. Deutsch at that time?

A Yes.

Q Will you tell the Court and jury what Mr. Deutsch said to you and what you said to him?

A Well, he said --

MR. BLOCK: Subject to connection, your Honor.

THE COURT: Yes, subject to connection as to Mr. Cohen and Mr. Duboff, at this point.

A He said he had been looking for me and couldn't get in touch with me, that he had a job for me that I would be interested in, and would I come up to his office.

Q Did you, in fact, thereafter meet with Mr. Deutsch in his office?

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MR. ROBSON: If your Honor please, can he not lead the witness? The question is, what happened next?

THE COURT: I recognize the validity of your objection and would hope that the Government would not lead hereafter, but I will permit the witness to answer this one.

A Yes, I did.

THE COURT: You did meet with him?

THE WITNESS: Yes, sir.

Q Where did this meeting take place?

A At Jaffee & Company.

Q Do you recall approximately how long after the meeting in Chock Full O' Nuts that this meeting took place?

A Couple of days.

Q What was Jaffee & Company?

A Stock brokerage house.

Q Mr. Deutsch was employed at Jaffee at that time?

A Yes.

Q Did you have a conversation with Mr. Deutsch in Jaffee & Company at that time?

A Yes, I did.

Q Can you tell the Court and jury what Mr. Deutsch said to you and what you said to him on that occasion?

A Mr. Deutsch told me he had a job for me for a new firm that was opening up, and Mr. Stanley Ryback was starting a new firm and he was helping him out, and he asked me if I would like the job as cashier.

Q Who was Stanley Ryback?

A He became president of New Dimension Securities.

Q Do you know what he was doing at that time?

A He had a store on Nostrand Avenue called Guys with Buys.

Q What else did Mr. Deutsch say, if anything?

A He asked me what salary I wanted, and I quoted a price, and he said "Fine."

Then I asked him about a contract and he said if I wanted one,he would have one drawn up.

I asked about bonus, and he said to me I would get one percent of the profits.

Q Was there any other conversation?

A Yes. He had told me that the first thing I should be doing is go out and look for an office for New Dimension.

Q After this meeting, did you have occasion either to meet with or speak with Mr. Ryback?

A On two occasions -- I called him after the conversation and he just about quoted the same thing to

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me that Mr. Deutsch had talked about, and the second time, in about a week, I went down to his store to meet him.

MR. ROBSON: Your Honor, I object to this witness' conversation with Mr. Ryback as hearsay.

THE COURT: Note, if you would, Page 2 of the information, where certain information appears.

MR. ROBSON: I realize that, your Honor, but we are more than four weeks into this trial, and I think there comes a point where taking things subject to connection is inappropriate.

THE COURT: Overruled.

Maybe it is inappropriate and I may stop saying it, but at the moment I am going to permit the conversation to go in.

It is subject to connection as it relates to the defendants here on trial.

You had a conversation, you say, with Mr. Ryback?

THE WITNESS: That's correct.

THE COURT: That was after you met with Mr. Deutsch?

THE WITNESS: Yes, your Honor.

Q What, if anything, did you do during the summer with respect to this new position?

A New Dimension Securities Corporation.

Q When did New Dimension open for business?

A On December 4th was the first trading date.

Q 1969?

A Yes.

Q Can you tell the Court and jury who was working at New Dimension Securities at 17 Battery Place at that time?

A Miss Elizabeth Danford, myself and Mr. Ryback.

Q What was Miss Danford?

A The secretary.

Q How many rooms did New Dimension have at that time?

A Two rooms.

Q Can you tell the Court and jury where you were located, where Mr. Ryback was located?

A There were two rooms, one in back of the other. Miss Danford was in the front room, the secretary, and Mr. Ryback and myself were in the second office.

Q Do you know what experience, if any, Mr. Ryback had in the securities business?

MR. SEGAL: Objection.

THE COURT: If you know this of your own knowledge, you may tell us.

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A None, that I know of.

MR. SEGAL: Your Honor, I don't understand that. The witness doesn't know of any, but not that the individual Ryback had none?

THE COURT: Let me find out.

Can you answer Mr. Segal's query? Is it that you are saying that there is none you know of, or that you have knowledge and that your knowledge is that Mr. Ryback had no prior experience in the securities business?

THE WITNESS: I would say he had no prior experience as being a broker in the securities business.

THE COURT: May I inquire in one respect: How did you derive this information? How did you reach the point where you can make a statement such as you just made?

THE WITNESS: I have been in the business twenty years, your Honor. Mr. Ryback, outside of being an individual who may have traded for his own account, has never done any trading in the Street.

The man was never registered. This was the first time he was coming into the securities business.

THE COURT: Did you learn this by conversation with him or from some other source?

THE WITNESS: From conversation with him and from

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other people.

Q What were your responsibilities at New Dimension?

A I was the cashier.

Q What did that mean in terms of your responsibility there?

A I was to see that the records were kept correctly.

Q Did you have charge of the records kept by New Dimension Securities?

A Yes.

Q I am going to ask you to look at Government's Exhibits 70-A, 70-B, 70-C, 70-D-1 and 70-D-2, and then 70-D-3 through 14. In other words, that is 70-D-1 through 70-D-14.

I ask you to look at these records and ask if you can identify them.

MR. SEGAL: Your Honor, do we only have a D-1 and not a D?

THE COURT: Apparently it starts with D-1 through 14.

MR. FEFFER: That is correct, your Honor.

Q I think it might be easier if you start with 70-A first, Mr. Rothman.

(Pause.)

THE COURT: Yes, they are, but will only be shown or read to the jury in a redacted form. Is that satisfactory?

MR. ROBSON: Yes, sir. All I am concerned about is that irrelevant material not go in.

THE COURT: I think we have covered that, and I believe the government indicated just before the jury came in that they would be agreeable to a presentation in a redacted form.

(Government's Exhibits 70-D1 through 14 were received in evidence)

THE COURT: Mr. Feffer, as I understand it, those are being offered subject to connection against Mr. Cohen, is that right?

MR. FEFFER: At this point, yes, your Honor.

THE COURT: Very well.

MR. ROBSON: If your Honor please, I ask that it be taken subject to connection against Mr. Duboff also.

THE COURT: At this juncture of the record, yes.

MR. SEGAL: And to Mr. Deutsch, your Honor.

THE COURT: Mr. Deutsch is another story. For the moment I will cover all three of them with the

subject to connection.

MR. FEFFER: Your Honor, may I pass out copies of Government's Exhibit 50 to the jury?

THE COURT: 50, yes. That is in evidence. They have seen it once.

(Pause)

Q I believe you have a copy, Mr. Rothman, of what has been marked and received in evidence as Government's Exhibit 50, and I'd like you to turn, and everyone else, to sheet number 4. If you will note on the column marked 12/11 under the source of stock column, there is a reference to New Dimension Securities; and that name, New Dimension Securities appears thereafter through the final date on the chart, 4/22. Do you see that?

A Yes.

Q Mr. Rothman, I want to ask you certain questions with respect to this chart. This chart reflects at least to the extent that New Dimension is --

MR. ROBSON: If your Honor please, I object to Mr. Feffer's testifying as to what the chart reflects. He is here to ask the witness questions.

THE COURT: All right.

MR. FEFFER: I can read from the chart if

Mr. Robson would like me to, but I prefer to make a quick simple statement.

THE COURT: Mr. Robson seems to want you to.

MR. ROBSON: The witness is here to answer questions. I don't think Mr. Feffer is entitled to stop at any point in the testimony he wants and read to the jury from something which has been read from previously.

THE COURT: I think you can direct the witness' attention to some portion of the exhibit which is before him, copies of which are before the jury.

MR. FEFFER: I'd like to have the witness then look from 12/11 to 4/22 to times when New Dimension Securities appears there.

THE COURT: You asked him first to look to sheet 4; is that correct?

MR. FEFFER: Yes, your Honor.

Q I'd like to ask you, Mr. Rothman, if you know from your knowledge from looking at this chart what is reflected by source of stock and New Dimension Securities?

MR. SEGAL: Objection. I don't know what that means, your Honor.

MR. FEFFER: I'd like to read it, your Honor,

but if I am asking questions like this, I have to do it like this.

THE COURT: The exhibit does speak for itself, and I don't think we need too much of an explanation from this witness. My recollection is you had some testimony from Mr. Philmore along the lines of what it says, and I don't really think it helps us at all to have the witness repeat what Mr. Philmore said.

MR. FEFFER: The point is, I want to ask him questions about transactions reflected on this chart, and I want to make sure he understands what this is. It is in evidence already.

THE COURT: Let me ask him one question.

You are looking at a government exhibit which is in evidence. You have indicated you have considerable experience in the securities industry as a cashier. Do you understand how this chart is set up?

THE WITNESS: Yes, your Honor.

MR. FEFFER: Okay.

Q Did you execute yourself any of the sales of Richard Packing stock listed on that chart from New Dimension to Jaffee & Company?

A I could have, yes.

Q Did you or could you have?

MR. SEGAL: Your Honor, I ask that that be stricken.

Q To your best recollection.

THE COURT: Strike it and let's go back and ask the question as you now have. What is your best recollection, sir?

THE WITNESS: My best recollection is, your Honor, that I might have or I could have.

MR. SEGAL: I ask that that be stricken, your Honor.

THE WITNESS: I probably did.

MR. SEGAL: I ask that that all be stricken.

THE COURT: Yes, strike it. Perhaps you can refresh the witness' recollection or maybe the witness as he is thinking has his own recollection refreshed.

Q Let me ask you a few general questions. Who was present working at New Dimension Securities during the months of December, January, February and March; December 1969 and the early part of 1970?

A Mr. Ryback, myself, Miss Danford.

Q Miss Danford was the secretary that you referred to before?

A Yes.

Q I want you to look at that chart again and just give us your best recollection as to whether you executed sales of Richard Packing stock to Jaffee & Co.?

A Yes.

MR. ROBSON: The witness has answered the question twice, your Honor, and I object to the word "executed" because I have no idea what that means.

Q Did you take part in any fashion in the sale of Richard Packing stock as reflected on that chart to Jaffe & Co.?

MR. SEGAL: Objection, your Honor. This man was the cashier.

THE COURT: He may have made entries, done other things. Overruled.

A Yes.

Q Can you tell the Court and jury approximately, to the best of your recollection, the percentage of those trades you executed?

MR. ROBSON: If your Honor please, the witness testified he took part in some way in these transactions. I don't know whether that means he made an entry in the books --

THE COURT: Change the question from "executed" because I think that is an objectionable word.

Q Can you tell the Court and jury what you did with respect to any portion of the trades that are reflected on Government's Exhibit 50?

THE COURT: What, if anything, you did.

MR. ROBSON: And with respect to which trades, your Honor.

MR. FEFFER: I would like the general answer first, your Honor.

MR. ROBSON: I would like the specifics first, your Honor.

THE COURT: With respect to trade beginning December 11, 1969.

Q Are you able to recall specifically as to each trade what your responsibility was, if any -- as to each trade listed there?

A It is hard to say for each trade. Of the group of trades that are on here, I would say I took part in about approximately 25 percent.

Q Can you tell the Court and jury --

MR. SEGAL: Objection, your Honor, as to taking part.

THE COURT: Overruled.

Q Can you tell us what you meant by taking part in approximately 25 percent of the trades reflected on

Government's Exhibit 50?

A Selling the stock over the telephone to the broker who was involved.

Q I would like you to tell the Court and jury the manner in which you sold 25 percent of those shares that are reflected on that chart.

A During the morning, when we start business, we get a phone call from Jaffee & Co., either Mr. Deutsch or Mr. Duboff, stating that --

MR. SEGAL: I object to this. This witness can either testify to what he knows -- nothing more.

THE COURT: Was there a practice that took place?

THE WITNESS: Yes, your Honor.

THE COURT: Did that practice take place during the period December 1969 through April 1970?

THE WITNESS: Yes, your Honor.

THE COURT: You are familiar with that practice?

THE WITNESS: Yes, your Honor.

Q Go ahead.

A Mr. Deutsch and Mr. Duboff would call in the morning before the opening and they would --

MR. ROBSON: Your Honor, could we have some

identification of who was called? Is this witness testifying he was called?

THE COURT: Let's take it from there. That is a perfectly good comment by Mr. Robson. There was an income telephone call.

THE WITNESS: Yes, your Honor. Approximately of all the phone calls that came in during this time, 25 percent of the time I answered the phone.

MR. ROBSON: I ask that the witness not volunteer information, your Honor.

THE COURT: Let's get on with it, gentlemen.

Apparently the practice was, am I correct, for Mr. Deutsch or Mr. Duboff to make a telephone call in to New Dimension?

THE WITNESS: That's correct.

THE COURT: You indicated there were several people working there.

THE WITNESS: Right, your Honor.

THE COURT : And you indicated something else, and let me get it clear in my own mind: When the telephone rang, were there occasions when you picked it up?

THE WITNESS: Yes, your Honor.

THE COURT: On those occasions, would you tell us who was on the other end of the line and the conversa-

tion or nature of the conversation?

THE WITNESS: Either Mr. Deutsch or Mr. Duboff. The nature of the conversation would go that --

MR. SEGAL: Is this witness reporting what he can testify to --

THE COURT: Let's make sure. These are calls that you actually heard one of these gentlemen speak on the other end of the phone?

THE WITNESS: Yes, your Honor.

THE COURT: You say either Mr. Deutsch or Mr. Duboff would call and you will tell us the substance of the conversation.

THE WITNESS: To the best of my knowledge.

THE COURT: This is subject to connection as to Mr. Cohen.

THE WITNESS: They would tell me that we are selling them a certain amoung of shares of Richard Packin, at a price and we should go out and pick it up at a certain broker at a certain price, and then, in turn, sell it to them, and the other way --

Q Were there any negotiations with respect to that price between yourself and either Mr. Deutsch or Mr. Duboff?

A No. The price was set.

Q By who?

A By either Mr. Deutsch or Mr. Duboff.

THE COURT: You are talking about Richard Packing Company sotck?

THE WITNESS: Yes, your Honor.

THE COURT: Just stick to that.

MR. SEGAL: Your Honor, may we have what "price set" means here?

MR. FEFFER: Your Honor, I think the cross-examination is to follow and --

MR. SEGAL: I would ask that "prices set" be stricken.

THE COURT: Why don't we try to get in representative form what was said. Try to tell us how it sounded to you when you heard from Mr. Duboff or Mr. Deutsch. What did they say, in words or substance?

THE WITNESS: They would say to me,"I'm selling them," for instance, "1,000 shares of Richard Packing" at a certain price and that I should go out to a broker which they would name to me to pick up the stock at another price and, in turn, they would buy it from us at the price that they set originally.

Q You were about to say there was a second method.

A Yes.

Q What was that?

A The second method would be that they would call and ask me to go out into the street, meaning to call other brokers, and clean up the street, which means to buy as much Richard Packing as I can at a certain price and then, in turn, I would call them back and tell them how many shares I bought and they, in turn, would buy the stock from us at a price that they set.

Q Did New Dimensions quote the prices of Richard Packing stock in the pink sheets at that time?

A Yes.

Q Will you tell the Court and jury how the price you put in the pink sheets was set?

MR. ROBSON: If this witness knows, your Honor?

THE COURT: Did you participate in putting prices into the pink sheets?

THE WITNESS: Yes, your Honor.

Q Can you tell us what you did -

MR. ROBSON: Can we ascertain what he did?

THE COURT: We just asked him that.

THE WITNESS: If Mr. Robson will wait, I will tell him.

THE COURT: I know you will. Mr. Robson and

the Court have both inquired, what did you do. Tell us what you did physically to "put a price into the pink sheets"?

A In the pink sheets they give you cards with the names of the stock that you trade in. On these cards you would put a bid and asked prices on the stock and turn it into them. When I did this, I would get a call in the monring, from either Mr. Deutsch or Mr. Duboff, telling me what price to put into the pink sheets for the following day, and then pink sheets would come around 11:00 o'clock in the morning and pick them up and take them and they would be printed the next day.

Q Did other people in the office receive telephone calls, as far as you know, beside yourself, with respect to prices in the pink sheets?

A Yes, they did, Mr. Ryback and Miss Danford.

Q I show you what has been marked 71-A for identification and ask you to look at it and identify it, if you can.

A This is a check from Richard Packing Company made out to New Dimension Securities Corp. in the amount of $200,000.

MR. ROBSON: Could I have that question and answer reread?

THE COURT: Yes.

(Record read)

MR. PEFFER: Your Honor, at this time the government offers 71-A for identification.

THE COURT: Show it to counsel.

MR. BLOCK: If your Honor please, I understand what your Honor's ruling is with respect to this, so that --

THE COURT: I will take it, at this point, that you are renewing the objection heretofore made at the side bar, and the ruling is the same.

MR. ROBSON: Ijoin in that objection, your Honor.

MR. SEGAL: I join in it, your Honor.

THE COURT: The ruling made previously remains as to all three defendants.

At this point the exhibit is being received subject to connection against Mr. Deutsch and Mr. Duboff.

MR. BLOCK: Just one second on this, your Honor, because I am seeing the check for the first time --

THE COURT: Yes, indeed.

(Pause)

(Government's Exhibit 71-A was received in evidence)

MR. FEFFER: May I refer to this exhibit, your Honor?

THE COURT: You may.

MR. FEFFER: 71-A, ladies and gentlemen, is a check of Richard Packing Company for $200,000 to New Dimension Securities. It is dated, I believe, 12/31, check No. 830, and it is signed by Milton Cohen.

Q Mr. Rothman, did you have a conversation with respect to that check with anybody?

A Yes, I did.

Q Who was this conversation with?

A Mr. Ryback.

Q Where did this conversation take place?

A In the office of New Dimension.

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Q What did Mr.Ryback say to you with respect to this particular check, which is Government's Exhibit No. 71-A?

MR. BLOCK: That, of course, is subject to connection, your Honor?

THE COURT: Yes, it is subject to connection against all three of the defendants, and also perhaps we could specify the date or approximate date of the conversation.

Q Do you recall the --

MR. SEGAL: Your Honor, we would have just a standing objection to this entire line.

THE COURT: All right. It is being received, as you can appreciate, subject to connection.

Q Do you recall the approximate date of this conversation?

A Sometime in the early part of January, 1970.

Q What did Mr. Ryback say to you on that occasion?

A I asked him how come we were getting $200,000 in Richard Packing Company, and he told me Richard Packing was opening up a customer account with us, and he took the money and put it in our bank account.

Q What was the largest customer account that New Dimension had?

A Richard Packing Company.

Q What was done with the $200,000,if you know?

A Went into our bank account.

MR. BLOCK: I object to that.

THE COURT: He has answered it. It went into their bank account.

The check speaks for itself.

Q That would be the New Dimension Securities bank account?

A Yes.

Q Were there ever any trades made by Richard Packing Company?

A No.

Q Was this money returned or refunded to that company?

A Yes, it was.

Q I show you 71-B through 71-F, and I ask you to look at each and identify them, if you can.

A There is a check dated April 24, 1970, made out to the Campus Information, in the amount of $75,000. This was charged to the account of Richard Packing Company and mailed to them.

THE COURT: 71-B?

THE WITNESS: 71-B, your Honor.

A On May 25, 1970, there is a check made out to Richard Packing Company in the amount of $25,000, which was sent to them.

That is 71-C.

MR. SEGAL: Your Honor, is this witness identifying or testifying?

THE COURT: He is doing both. Do you object to that?

MR. SEGAL: Yes, your Honor.

THE COURT: Just identify them.

Q Does your handwriting appear on any of those checks?

A On all but one of the checks my handwriting appears.

There are two checks, June 3rd, June 25th, $25,000 each, to Richard Packing Company, and the last one, July 2, 1970, made out to Richard Packing Company in the amount of $50,000.

Q I show you Government's Exhibit 72 for identification and ask you to look at that and identify it, if you can.

A This is the account sheets of Richard Packing Company with New Dimension Securities.

MR. FEFFER: At this time, the Government offers

the 71 series and 72 for identification.

THE COURT: That is five checks, is it, and an accounting record?

MR. FEFFER: That is correct.

THE COURT: Show it to counsel.

(Pause.)

MR. BLOCK: If your Honor please, the same objection, and I assume the same ruling?

THE COURT: Same ruling, yes.

MR. ROBSON: Same objection, if your Honor please, as previously entered.

THE COURT: Same ruling. That will be subject to connection as it relates to Mr. Duboff and Mr. Deutsch at this time.

MR. SEGAL: Same objection.

THE COURT: Same ruling. As I just indicated to Mr. Robson, it is subject to connection as to Mr. Deutsch and Mr. Duboff at this time.

(Government's Exhibits 71-B through 71-F for identification were received in evidence.)

MR. FEFFER: Your Honor, perhaps I can refer to these briefly while counsel --

(Defendant's Exhibit No. 71 for identification was received in evidence.)

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MR. FEFFFER: May I refer to these briefly, your Honor?

THE COURT: Just one moment.

Is there an objection to 72 for identification? You make the same objection as to 71?

MR. SEGAL: Same objection.

MR. BLOCK: Same objection.

MR. ROBSON: Same objection.

THE COURT: Same ruling, and they are received subject to connection as to Mr. Deutsch and Mr. Duboff.

You may proceed, Mr. Feffer.

MR. FEFFER: Ladies and gentlemen, there are five checks. 71-B is made out to Campus Information in the amount of $75,000.

Q Did you have a conversation with anyone with respect to the name "Campus Information" printed on one of these checks?

A Yes, with Mr. Ryback.

Q Did that occur about the time this check was made out?

A Yes.

Q What did he say about this?

A That was instructions given to him by Richard Packing Company, they wanted the check charged to their

account, made out that way.

MR. FEFFER: 71-C, $25,000; 71-D, another check made out to Richard Packing, $25,000, the date is June 3rd.

On June 25th, 71-E, another check for $25,000, by New Dimension to Richard Packing, and 71-F, dated July 2nd, $50,000, Richard Packing.

72 is the account statements for Richard Packing, monthly statements at New Dimension Securities.

Q Mr. Rothman, do you know approximately how much money was made by New Dimension Securities by the end of April, 1970?

MR. BLOCK: Objection.

THE COURT: Let me hear the question again, Mr. Reporter, please.

(Question read.)

MR. ROBSON: I object to that also, your Honor. I see absolutely no relevance to the issues in this case.

THE COURT: You relate that to Richard Packing Company stock, and I will permit a limited question.

Q Do you know how much money was made by New Dimension Securities in the trading of Richard Packing stock by July 31, 1970?

MR. SEGAL: Your Honor, with regard to the word

"made" --

Q How much money was realized or earned by New Dimension? What was the profit made by New Dimension in the trading of Richard Packing stock by July 31, 1970?

MR. ROBSON: Your Honor, I still object to it.

My objection is that it has no relevance to the issues in this case.

MR. BLOCK: I join in that, and certainly, if you are going to admit it, it is subject to connection as far as Mr. Cohen is concerned.

THE COURT: Let me suggest it is subject to connection at this time.

As far as your objection, Mr. Robson, as I view Count 1 of the information, without going into details, this would be relevant. I note particularly the named persons in Paragraph 6 of that count, and, under the circumstances, if it is limited to Richard Packing Company, and if it is limited to the period between --

MR. FEFFER: July 31, 1970 was the time I asked, your Honor.

THE COURT: They began business in December of 1969?

MR. FEFFER: Right.

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THE COURT: Limiting to that period, no later than July 31, 1970, I will overrule your objection and you have an exception, and it is subject to connection.

Q Go ahead.

A Approximately $115,000.

Q Did you ever receive one percent of the profits?

A No.

Q I believe you testified that as a cashier you maintained the books and records of New Dimension Securities; is that correct?

A Yes.

Q Was it your responsibility to make out checks for the rent that you paid at New Dimension?

A Yes.

Q What was the amount of rent that New Dimension paid at 17 Battery Place?

A Approximately $500 a month.

MR. SEGAL: Your Honor, I object to this entire line, unless the Government can make an offer of proof as to why rent --

MR. FEFFER: It is coming now, your Honor.

THE COURT: All right. Proceed. The question has been answered. Ask your next question.

Q Did there come a time when checks were made out

the witness in this summer of 1969; they have further presented evidence of a practice whereby either Mr. Deutsch or Mr. Duboff would call and would indicate certain things relative to certain quantities of Richard Packing Company stock at certain prices. I'm not going to dwell on the matter further. You know what the proof was.

Finally, they presented proof that between the time New Dimension went into business and July 31, 1970, approximately $115,000 in profits was earned on Richard Packing stock.

The government now seeks to establish through a number of checks which they wish to offer, that those profits were syphoned from New Dimension Securities and were paid to or for the benefit of Mr. Deutsch and Mr. Duboff. The government argues that the monies which were ostensibly for rental payments were payments made in connection with premises which New Dimension did not at any time occupy and, therefore, the government would argue that this was a blind and was a means whereby Mr. Deutsch and Mr. Duboff syphoned off profits from New Dimension Securities.

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That seems to be the government's basic approach. Perhaps if you want to add to that, Mr. Feffer, if I have overlooked anything, and then I would hear briefly from counsel for the defendants in response.

MR. FEFFER: I think that your Honor has stated it correctly. Essentially we are trying to establish that a townhouse which the government alleges was bought by Mr. Deutsch and Mr. Duboff in the name of a partnership called DH and DF, that that townhouse was paid for, furnished, decorated, and everything else in that vein, by proceeds taken from New Dimension Securities, and in that vein, your Honor, the government attempts to establish that Mr. Deutsch and Mr. Duboff controlled New Dimension Securities, which is an issue in this case, and I don't think anyone can claim to the contrary.

MR. SEGAL: The government misspeaks, when it talks about the fact that that townhouse was never occupied by New Dimensions. That seems to be a central point in the Court's summary of what the position is, that the Court sees.

THE COURT: That was my understanding of the presentation made at the side bar.

MR. SEGAL: I do thing the government should, in all candor to the Court, explain what it knows about

New Dimension Securities for six to nine months.

How is that inconsistent with Mr.Deutsch running New Dimension Securities? He says that he was retained and employed and he took instructions from, and everything he did was from Mr. Deutsch.

This witness now gets on the stand and says all the trading in Richard Packing Company was not being conducted by Mr. Ryback but was being conducted over the telephone by Mr. Deutsch and Mr. Duboff telling him what trades to make and at what price.

We have a right to argue to this jury to establish a motive for the charges in this case that Mr. Deutsch and Mr. Duboff controlled and were in fact New Dimension, and when money leaves that firm and goes to their own townhouse, which they own, and this is not all of it, your Honor, because that townhouse was lavishly decorated, with swimming pools, sauna baths, bedrooms, and the money to pay for that came from New Dimension. Furniture and antiques were purchased in Europe and this money came from New Dimension to pay for that.

Certainly the Government is entitled to show that New Dimension, when they are paying all this money out to Mr. Deutsch and Mr. Duboff, is in fact Mr. Deutsch and Mr. Duboff.

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of Dimension Securities checks similar to those which have been discussed at the side bar and now which are dated prior to July 31, 1970, which is the last date of the conspiracy.

Bring in the jury, please, Miss Kruger.

(The jury entered the courtroom.)

S O M E R J A C K R O T H M A N,

resumed.

THE COURT: You may proceed, Mr. Feffer.

MR. FEFFER: Thank you.

DIRECT EXAMINATION CONTINUED

BY MR. FEFFER:

Q Mr. Rothman, I believe that prior to the recess you testified that the monthly rent that was paid at 17 Battery Place was $500 a month; is that correct?

A That's correct.

Q Did there come a time when checks were made out by you for rent in connection with another building --

MR. SEGAL: I object to that, to the leading.

THE COURT: Yes.

Q Did there come a time when checks were made payable to someone else other than the landlord at 17 Battery place?

A Yes, your Honor -- I mean, yes.

Q I want to show you what has been marked as 73-A, 73-B, 73-C, 73-D, and 73-E.

I first want you to look at 73-A and ask you if you can identify that.

A It's a check made out to Status Marketing Corporation in the amount of $20,000.

MR. SEGAL: Objection, your HOnor. The answer is yes or no.

THE COURT: Can you identify that?

THE WITNESS: Yes, I can.

Q Does your handwriting appear on that check?

A Yes it does.

Q Did you have a conversation with anybody with respect to Government's Exhibit 73-A?

A Yes.

Q With whom?

A Mr. Ryback.

Q What did Mr. Ryback say to you with respect to 73-A?

THE COURT: Let's ascertain when he had the conversation.

Q Can you approximate when this conversation took place and where it took place?

A It would be about the time I made out the check

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at 17 Battery Place.

Q Can you tell us approximately when that was?

A April 6, 1970.

Q I ask you again, what did Mr. Ryback say to you and what did you say to Mr. Ryback in connection with Government's Exhibit 73-A?

MR. ROBSON: Objection to the conversation as hearsay.

MR. BLOCK: Is this subject to connection, your Honor?

THE COURT: Yes, it's offered subject to connection to all of the defendants, since I gather when you spoke to Mr. Ryback, neither Mr. Cohen nor Mr. Deutsch nor Mr. Duboff was present.

THE WITNESS: That's correct.

A I asked Mr. Ryback about that. He told me that we were going to move uptown to a townhouse; that we were taking space.

Q Was this check in connection with that townhouse?

A Yes, it was.

MR. FEFFER: The Government offers 73-A, your Honor.

THE COURT: Show it to counsel.

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MR. SEGAL: An objection has been made to it, as there being not a proper foundation laid, and I would continue my objection to that.

MR. ROBSON: May I ask the witness one question on the voir dire, your Honor?

THE COURT: You certainly may, Mr. Robson.

VOIR DIRE EXAMINATION

BY MR. ROBSON:

Q Did Mr. Ryback tell you what this check was in payment of?

A It was in payment of a lease --

Q Did he tell you --

MR. FEFFER: He is answering the question, your Honor.

THE COURT: Did he tell you, yes or no?

THE WITNESS: Yes.

Q What did he tell you it was in payment of?

A A lease at 124 East 38th Street.

Q He said it was in payment of a lease?

A He said it was for the lease, in payment of a lease.

Q Is that all he told you about it?

A That's all I recall.

MR. ROBSON: I object to it, if your Honor

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please, on the ground that this witness does not know and from his testimony it is impossible to tell what this check was for.

MR. FEFFER: I just want to respond that there has been testimony that it was for a townhouse --

MR. ROBSON: If your Honor please. The witness has testified. I'd appreciate it if you wouldn't comment on his testimony. The Judge heard the testimony as well as both of us.

THE COURT: I heard the testimony.

Let me inquire whether Mr. Block has any objection.

MR. BLOCK: I most certainly do, except I assume your Honor is going to take it subject to connection, if you take it, as to Mr. Cohen.

THE COURT: That is my disposition as to Mr. Cohen.

Let me look at the document.

(Pause.)

THE COURT: I understand you to say that you wrote the check in your hand and Mr. Ryback signed it?

THE WITNESS: That's correct, your Honor.

THE COURT: Did you write the language on the left side of the check?

THE WITNESS: Yes, your Honor.

THE COURT: Did you do that as a result of a conversation with anyone?

THE WITNESS: With Mr. Ryback, your Honor.

THE COURT: Can you tell me the address of the premises, if you know, can you tell me the address of the premises to which New Dimension Securities was to move?

THE WITNESS: 124 East 38th Street.

THE COURT: And can you tell me if Mr. Ryback told you when New Dimension was moving into those premises?

THE WITNESS: As soon as it was renovated for us.

THE COURT: The objection is overruled. Subject to connection as to all three of the defendants at this time.

MR. SEGAL: Your Honor, in connection with that check, there is still a basic foundation objection that is continuing here, which we have already indicated to the Court as to the admissibility of this document.

THE COURT: Let me see the check as far as showing it or reading it to the jury at this time.

MR. FEFFER: My only response would be that the testimony laid the foundation.

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THE COURT: I recognize that.

(Pause.)

THE COURT: I am admitting it as to all three defendants subject to connection, and I think that subject to connection covers a multitude of things. Also, if I might say so, subject to a motion to strike.

MR. SEGAL: Very well, your Honor.

(Government's Exhibit 73-A was received in evidence)

Q I want to show you the next one that I referred to, that would be 73-B for identification and ask you if you can identify that.

A Yes, I can.

Q Did you have any conversation with anyone with respect to that particular check?

A The same conversation I had before on the previous check.

Q That would be with Mr. Ryback?

A That's right.

Q When did this conversation take place?

A The early part of April.

THE COURT: In other words, you discussed both of these checks in the same conversation?

THE WITNESS: Yes, your Honor.

Q I am also going to show you what's been marked as 73-C and ask you if you can first identify that.

A The only thing I can say about this, is that it is one of the New Dimension's checks.

MR. SEGAL: Objection, your Honor.

Q No, can you identify that?

A No, I can't.

THE COURT: Which one was that? 73-C?

MR. FEFFER: 73-C, your Honor.

Q I want to show you now 73-D and 73-E.

THE COURT: Can you identify those?

A 73-D --

THE COURT: Just say yes or no.

A No. 73-E, yes.

Q What is 73-E?

A A check in the amount of $2,000 payable to DH and DF Company.

MR. FEFFER: The government offers at this time, 73-B and 73-E.

MR. BLOCK: If your Honor please, I have the same objection to those proferred exhibits, to wit, 73-B and 73-E. If your Honor sees fit to admit them, I would have a motion to make at the side bar.

THE COURT: Let me see them when counsel are finished with them. In fact, when counsel finish speaking.

Are there any further objections by counsel?

MR. SEGAL: Your Honor, it's a reiteration of the same objections we have furnished through this entire series. I suppose for the record I refer specifically to, I believe, its D in particular.

THE COURT: E?

MR. SEGAL: D.

THE COURT: I have A and B --

MR. SEGAL: I am sorry, I mean E.

THE COURT: Do you want a voir dire on E?

MR. SEGAL: No, your Honor.

THE COURT: Very well. I think counsel indicated that if I was disposed to admit the two proffered documents B and E he would like to come to the side bar; is that right, Mr. Block?

MR. BLOCK: I don't think I have to. I would simply renew a motion I made before which I believe your Honor is aware of.

THE COURT: Yes, indeed. Under the circumstances, that motion is denied. You have your exception. The objections heretofore interposed and restated are overruled as to these two exhibits and 73-B and 73-E are admitted subject to connection and subject to the motion to strike. Subject to connection as to all three defendants.

Subject to the motion to strike by counsel.

Q Mr. Rothman, I want to show you 73-C and ask you if you can recognize, first the signature on that check?

A Yes, Mr. Ryback.

Q Do you know whose handwriting that is?

A Mr. Ryback's.

Q Do you have occasion with respect to this check to make certain entries in the books and records of New Dimension, if you recall?

A I believe so.

Q I am going to ask you the same question with respect to this check, which would be 73-C. And ask you first, can you identify the handwriting on the back of that check?

A No, I can't.

Q Can you identify the signature on that check?

A Yes, Mr. Ryback's.

Q Did you have an occasion with respect to that check to make certain entries in the books and records of New Dimension?

A I believe so.

MR. FEFFER: Your Honor, on that basis the government offers 73-C and 73-D.

(Government's Exhibits 73-B and 73-E were received in evidence)

MR. ROBSON: May I inquire, your Honor.

THE COURT: Yes, Mr. Robson.

VOIR DIRE EXAMINATION

BY MR. ROBSON:

Q Mr. Rothman, do you know what these two checks are for?

A I believe --

Q Not what you believe. Do you know what these two checks are for?

A Unless I looked at the records I don't recall.

Q You don't recall? Do you have a way of refreshing your recollection?

A I would have to look at the entries that I made that day in the ledger.

THE COURT: These would have been entries made by you?

THE WITNESS: Yes.

MR. ROBSON: I object to the checks, please, on the ground there is no indication of what they are for.

THE COURT: He has indicated something. Perhaps counsel for the government would want to inquire further,

Mr. Robson.

THE WITNESS: On the back of one of the checks, your Honor --

THE COURT: No, don't tell us what is on the back of one of the checks. What book or record are you referring to, sir?

THE WITNESS: The general ledger, which would have the accounts.

THE COURT: Is that in court, counsel?

MR. FEFFER: No, your Honor.

THE COURT: Without refreshing your recollection, you don't know?

THE WITNESS: No, your Honor.

MR. SEGAL: May I ask a question on the voir dire ?

THE COURT: Indeed.

VOIR DIRE EXAMINATION

BY MR. SEGAL:

Q Mr. Rothman, as of April of 1970, were the books and records of New Dimension Securities kept by computer?

A Yes, they were.

Q Did you work the computer?

A I made entries to be fed into the machine.

Q Do you know whether or not you made entries with regard to these two checks that would be fed into the machine?

A Like I said, I'd have to take a look at the records.

Q But you don't know?

A I don't know for sure.

Q Was there also somebody else who was feeding information into a computer?

A Yes, there was.

Q Who was that?

A Mr. Hayashi.

Q Anybody else?

A Miss Danford.

Q Was there anybody else beside Miss Danford?

A No.

Q Either you or Mr. Hayashi or Miss Danford could have made the entries with respect to these two checks?

A It's possible.

Q What would there be by your looking at the actual two checks that would tell that you had made the entry rather than the other two persons?

A It would tell me that the entries were made.

Q But would it tell you that you made them?

A No, I don't believe it will.

MR. SEGAL: That will be a further objection, your Honor.

BY MR. FEFFER:

Q By looking at these entries that Mr. Segal is referring to, can you tell whether they were made in the regular course of business of New Dimension?

A Yes.

Q Was it the regular course of business of New Dimension to make entries reflecting checks that were made out to other people?

A Yes

MR. FEFFER: Your Honor, this time I'd like to refer to the checks that have been received in evidence.

MR. SEGAL: I thought that there was to be still further step with regard to the use of these checks.

THE COURT: No, it's subject to a motion to strike and he reads them at his peril now.

MR. SEGAL: Very well.

MR. FEFFER: 73-A, ladies and gentlemen, is a check of New Dimension Securities made out to Status

Marketing Corporation for $20,000, dated April 6, 1970 and it is entitled for assignment of lease, 124 East 38th Street.

73-B is a check made out to Status Marketing Corporation signed by Stanley Ryback, April 6, 1970 for $10,000 deposit on loan.

73-E is dated July 1st, 1970. It's made out to DH & DF Company, and it's made out in the amount of $2,000 and is signed by Stanley Ryback.

Q With respect to 73-E,dated July 1st, 1970, did you have a conversation with anybody with respect to that check?

A Yes, Mr. Ryback.

Q When did the conversation take place?

A When the check was made out.

Q Can you tell the Court and jury what Mr. Ryback said to you and what you said to him?

THE COURT: This is subject to connection as to the defendants here on trial. Proceed.

A I asked Mr. Ryback what the $2,000 was for; he said it was for rent at the townhouse.

Q How about with respect to DH &DF Company?

A That they owned the townhouse.

MR. FEFFER: Your Honor, at this time may I

pass what was marked as 73-F to your Honor and note the date and ask for a ruling under a case that we cited before.

(Pause)

THE COURT: I will adhere to my prior rulings on that subject.

MR. FEFFER: Fine, your Honor. May I have one second, your Honor?

THE COURT: Yes.

(Pause)

THE COURT: Just bear with me a moment, please, Mr. Feffer.

(Pause)

Q I want to show you what has been marked 74-A, 74-B, and 74-C. Can you identify these?

A Yes, I can.

Q What is 74-A?

A It is a check in the amount of $10,000 payable to Mr. Ralph Yandoli.

Q 74-B?

A A check in the amount of $5,000 made out to Mr. Yandoli.

Q 74-C?

A Another check made out to Mr. Ralph Yandoli for

$10,000.

Q Did you have a conversation with respect to 74-A with anybody?

A Mr. Ryback.

Q When did this conversation take place?

A At the time that the check was made out.

Q Would that be June 5, 1970 or thereabout?

A Yes.

Q Can you tell the Court and jury what Mr. Ryback said to you and what you said to him?

MR. SEGAL: The same objection, your Honor.

MR. ROBSON: Same objection.

THE COURT: This is June of 1970, right? Same ruling. This is of course subject to connection because I understand that none of the defendant were then present.

A I asked him what the check was for and he told me it was for work being done on the townhouse.

Q The same townhouse that you referred to before?

A Yes.

Q Do you know for what type of work?

A For renovating.

Q Have you been to the townhouse?

A Yes, I have.

Q The address was 124 East 38th Street?

A Yes.

Q Can you describe the townhouse, plase, for the Court and jury?

MR. SEGAL: Objection. It's not relevant; it's immaterial.

MR. FEFFER: It is relevant, your Honor.

MR. BLOCK: I object.

MR. SEGAL: I would ask that that statement be stricken.

THE COURT: Yes, the jury will disregard that statement. The description of the townhouse?

MR. FEFFER: May I just say something in that vein, your Honor in line with this witness' testimony about New Dimension's moving there?

THE COURT: You'd better do it at the side bar. I will hear you over here.

(At the side bar)

MR. FEFFER: Your Honor, as has been indicated by defense counsel, they will contend that this townhouse was being utilized or was supposed to be utilized in the future for a brokerage house. I will have this man testify there were five floors, and they were at that time in a two-room office, with a swimming pool, a sauna --

MR. ROBSON: Your Honor, the sauna is a 8 x 10 bathtub --

THE COURT: Let me say something, Mr. Feffer. I have no proof before me that they were to be the sole tenant here.

MR. FEFFER: The whole lease, your Honor, was to New Dimension.

THE COURT: That doesn't mean they were going to be the sole tenant. You have heard of subtenants. I have a problem with it.

MR. FEFFER: They were paying rent for the entire premises.

THE COURT: $2,000 a month.

MR. FEFFER: Up to then, but that was raised.

THE COURT: I have difficulty with this and I will think it out for a moment.

The objection is sustained.

(In open court)

MR. FEFFER: The government offers 74-A, B and C.

VOIR DIRE EXAMINATION

BY MR. ROBSON:

Q Mr. Rothman, do you have any knowledge with respect to the nature of the renovation work that these particular payments were made for?

A Would you please say that again?

Q Let's talk about 74-A, since that is the only one so far that you have identified.

Do you have any idea what that payment was for specifically? You stated that Mr. Ryback said it was for renovation work --

A For remodeling of the townhouse, any part that was remodeled. I don't know exactly what the money was for. It could have been part of a payment.

Q You have no idea what the payment was for, do you?

MR. ROBSON: If your Honor please, on that basis I would object. With respect to the other two checks, there has been no testimony at all, except that they are checks, and I would object to those.

MR. BLOCK: If your Honor please, I would

enter a general objection, that they are completely irrelevant to the issued involved in this case as far as my client is concerned.

THE COURT: Do you want to be heard, Mr. Feffer?

MR. FEFFER: Yes, your Honor.

BY MR. FEFFER:

Q You know, I believe, from your testimony that the first check, 74-A, was utilized --

MR. ROBSON: I object to the leading, your Honor.

THE COURT: Yes, don't lead him.

Q With respect to 74-B or 74-C, do you know for what purpose they were made out?

A To pay Mr. Yandoli for work he was doing on the townhouse.

Q The townhouse at 124 East 38th Street?

A Yes.

Q That was the townhouse you mentioned was owned by Mr. Deutsch and Mr. Duboff?

A That's correct.

MR. FEFFER: The government offers all three, your Honor.

Q One further question: The writing "Ralph

Yandoli," is that your handwriting?

A Yes, that is my handwriting.

THE COURT: Did you write these checks following a conversation with anyone?

THE WITNESS: I was instructed to write those checks by Mr. Ryback.

THE COURT: What if anything did Mr. Ryb ck say at the time he instructed you to write the check?

This is subject to connection as to the three defendants.

THE WITNESS: For work done on the townhouse by Mr. Yandoli.

THE COURT: Do you rememberMr. Ryback telling you during that conversation what type of work Mr. Yandoli did? Was he an interior decorator, a plumber, a roofer?

THE WITNESS: He was a carpenter, your Honor.

MR. FEFFER: This is the same argument that was made before, your Honor.

THE COURT: I know.

Overruled.

They will be received subject to connection but not a motion to strike. The motion to strike which I permitted to be made previously would, if now made, be denied.

with thirty or fifty employees in it.

MR. SCHATTEN: Is that in the record?

MR. ROBSON: No. Then I get stuck with representations that you make --

MR. FEFFER: By July 31, 1970, there was a New Dimension office in Boston with thirty or forty people in it?

MR. ROBSON: So I am advised.

THE COURT: Gentlemen, I have heard you. I have ruled and the ruling stands.

MR. BLOCK: Judge, I just want to say one thing on a completely different subject. I indicated to you without being specific, because I was in the presence of the jury, and I wanted to avoid any misunderstanding, and what I was intending to say when I told you I wanted to renew motions previously made, was that I was renewing the motion for a severance on behalf of Mr. Cohen.

THE COURT: I assumed that was the case.

MR. BLOCK: Now that your Honor has seen fit to admit the Yandoli checks, I submit they are so prejudicial to my client Cohen because they reflect so much skulduggery on the part of his co-defendants that I think he is irreparably damaged.

I am not making these motions simply for the

record, and one of these days I expect your Honor will grant my motion, and I think the point has been reached now.

THE COURT: Let me suggest this: Were it not for that $200,000 that floated into New Dimension from Richard Packing Company and then floated back out during this same period, I think your present motion would receive the most serious consideration by the Court. I recognize it is made in good faith.

However, on the present state of the record, I feel you are in a position because of that $200,000 that came into New Dimension where I could not, on the basis of this evidence, grant your motion for a severance.

However, that is not to say that we are not gettin to a point out on that outer edge, out on the periphery, where your motion may lie.

(In open court.)

THE COURT: Mr. Feffer, you may proceed.

MR. FEFFER: Your Honor, I am not sure of the last step.

Were these received in evidence, 74-A, B and C?

THE COURT: I remember A being covered. I am not sure if counsel wished to cover B and C, because I remember Mr. Robson making a specific statement during a

did not make any checks out --

Q You can just talk to me. You don't have to spit it out.

THE COURT: Please, Mr. Segal.

A I made out no checks except what Mr. Ryback told me to.

If he told me to make a check out to Yandoli for $10,000, it was for the work on the townhouse. That is what he told me.

Q Did he tell you it went for any other work?

A No.

Q You don't know whether it went for any personal work?

A No, I don't know.

Q Do you know whether or not it went for expenses incurred with Mr. Yandoli for his own private home?

A I don't know -- I don't recall of any work that Mr. Yandoli did for Mr. Ryback.

DIRECT EXAMINATION CONTINUED

BY MR. FEFFER:

Q Mr. Robson asked you about the work Mr. Yandoli did. Can you tell the Court and jury the work Mr. Yandoli did at the townhouse, if you know?

A Mr. Yandoli renovated rooms, offices in the town-

house. He built a pool downstairs in the townhouse, set up a sauna downstairs in the townhouse and, as far as I know, Mr. Yandoli headed the whole operation of fixing the townhouse.

MR. FEFFER: 74-B and C, I believe are already marked.

THE COURT: They were received subject to connection.

MR. FEFFER: May I refer to these to the jury, your Honor?

THE COURT: Yes.

(Mr. Feffer read to the jury from Government's Exhibits 74-B and C in evidence.)

Q I show you what has been marked Government's Exhibit 76 and ask you to look at it and identify it, if you can.

A This is a check in the amount of $2,772 --

MR. BLOCK: I object to the witness reading it, your Honor.

THE COURT: Yes. The jury will disregard the description.

It is a check.

Q Did you have a conversation with respect to that check?

MR. ROBSON: I was going to object generally on the ground of relevance, yes.

MR. FEFFER: That was the bill that I referred to earlier, your Honor.

(Pause.)

THE COURT: Yes, I recall this matter having come up at the side bar.

These two items are being received subject to connection against all three of the defendants.

You have your continuing objections, gentlemen.

(Government's Exhibits Nos. 75-A and 75-B for identification were received in evidence.)

Q Mr. Rothman, I believe you indicated that you had a conversation with respect to 75-B.

Did you relate all that conversation before, or was there more to that conversation?

A When I received the bill there was more to the conversation.

Q What did you say to Mr. Ryback at that time?

A I asked him who was getting a child's bedroom furniture.

Q What did he say?

A "Don't worry about it."

MR. FEFFER: May I refer to these exhibits, your

nor?

THE COURT: You may.

MR. FEFFER: 75-A is a check, June 23, 1970, to ncus Decorators, for $6,200.

75-B is a bill from Pincus Decorators for that ount, $6,200, Stanley Ryback, in care of New Dimension, Battery Place, New York City, dated 6/12/70, and is for living room furniture, den furniture, dining room rniture, drapes for above rooms, and additional bedroom apes.

Q Mr. Rothman, do you know where Mr. Duboff resided June and July of 1970?

A White Meadow Lake, New Jersey.

Q White Meadow Lake?

A Yes.

Q Did your office at 17 Battery Place, did it have child's bedroom in it?

A No.

Q To your knowledge, did the townhouse have a ild's bedroom in it?

A No.

MR. FEFFER: I have no further questions, your nor.

MR. SEGAL: May we approach the bench, your

objection, stating, "If the Government is going to try to use these checks to show there was or were funds made on situations outside of Richard Packing, I suggest to you that is highly prejudicial as far as my client is concerned."

That is just part of it.

Mr. Segal says he joined in that.

The point I make is that at no time subsequent thereto could it be said that Mr. Block or Mr. Orenstein opened the door. They did not inquire.

To a great extent, if I were to admit all of the checks in the Morginstin account, I would suggest that the person who might well be hurt as much as anyone, and maybe more than anyone, would be Mr. Cohen, who really didn't have a direct part in the account.

On this subject, and I am troubled by it, Mr. Feffer, I would hear from you.

MR. FEFFER: I am not sure whatyou meant by the last comment, your Honor.

THE COURT: If I were to have Mr. Deutsch here by himself -- let's assume that, for the moment -- I think I could indicate to you that I would be disposed to letting in 27-A through V on the theory that this was a nominee account.

Mr. Duboff gives me some pause, but I think I

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could probably convince myself that I would let it in as far as the two of them are concerned.

However, Mr. Cohen gives me considerable pause, for two reasons: He wasn't concerned, as I recall it, with the Morginstin account. He was not concerned with trading in other stocks and yet, despite any limiting instructions that might be given,he obviously would be hurt by an admission into evidence of all the checks.

At the moment, until I hear from you, I will indicate that I am disposed to admitting those checks which you can demonstrate and show to counsel, and I know there are some, which relate to Richard Packing Company transactions. That doesn't trouble me, but what troubles me, particularly as it relates to Mr. Cohen, is to go beyond Richard Packing Company.

MR. FEFFER: I would say that your Honor and Mr. Segal have brought out the portions of the record that needed to be brought out.

With respect to Mr. Cohen's connection to the trading by Mr. Morginstin, I think certainly, for example, the 1,500 shares that Mr. Morginstin received in this account, for his account, from the offering in March of 1969 certainly reflects a nexus between Richard Packing Company and the Morginstin account. I think, your Honor,

conduct to establish that that account was controlled by Mr. Deutsch, and that he was the only person who had any idea of what was happening in that account, as opposed to Mr. Morginstin.

THE COURT: How could I insulate Mr. Cohen from the fallout that will be the result of my admitting this million dollars worth of checks? Do you think I should or shouldn't?

MR. FEFFER: I think you should, your Honor.

THE COURT: I know I should. I don't see that I can give sufficient curative instructions to permit this.

I have no difficulty -- you must understand this -- relative to Mr. Deutsch. I said it now two or three times.

MR. FEFFER: I understand, your Honor.

Let me say one more thing. I think that the point that is being made by, for example, Mr. Cohen, and in fact as set forth in the offering circular, is that officers and employees of Richard Packing Company were going to sell 10,000 shares on their own efforts and that, in fact, if we accept that to be or to place -- I am probably using the wrong word, but whatever word is appropriate in the situation -- the 10,000 shares were going to be sold by the company's officers and directors using

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Q If there are problems --

THE COURT: No, he has found what he was looking for. I think he is prepared to give an answer. I think your question was, where did you buy or where did you acquire those 500 shares?

MR. BLOCK: Right.

THE COURT: And can you answer the question now?

THE WITNESS: Yes. I would say the 500 shares were sold short by the firm.

Q Sold short?

A That's correct.

Q You didn't sell stock short on every transaction, did you? In other words, looking at --

A I would say --

Q Looking at 50, there are a number of -- excuse me, if I may interrupt you -- if you look at Exhibit 50 in evidence, sold a number of shares of Richard Packing Company stock after December 11th. Was everyone of those transactions a short sale?

A The majority of them are.

Q They are?

A Yes.

Q Do you have which are not a short sale?

A Let me put it to you this way:

When you start as a short sale, you start picking up stock to cover a short sale. And you keep selling at the same time as buying. You can't say that you covered each transaction as you went along. At the end of the month the company was short 3,000 shares of stock in their account.

Q I see.

THE COURT: You're speaking about the month ofDecember, 1969?

THE WITNESS: Yes.

THE COURT: In other words, by the end of the month you had sold more shares than you had had in inventory or that you had purchased?

THE WITNESS: That's correct, your Honor.

THE COURT: By 3,000?

THE WITNESS: By 3,300.

Q Then there came a time, did there not, when you bought stock to bring your short position into an, at least an even or a long position, isn't that right?

A Some place along the line, yes.

Q Right. Now let's go to the business with the Underwriters Trust Company, sir.

Is it not correct, sir, that when New

Dimension bought stock as it did on occasion from another broker, let's take it that way, New Dimension would have to pay for that stock, obviously, isn't that right?

A That's correct, yes.

Q But if New Dimension turns around and sells that stock, then am I not correct that since you were clearing through the Underwriters Trust Company, that the transaction was essentially a wash transaction, and no money actually changed hands?

A Monies always changed hands.

Q So the monies changed hands, but in a sense it was a bookkeeping transaction, wasn't it?

A When stock came into the bank, the bank delivered out to the broker that it was sold to.

Q Right.

A They in turn either paid the broker or the bank that delivered the stock to them and they in turn when they delivered the stock, they got paid.

Q Right. So that this didn't really cost New Dimension any money, did it?

A No, it didn't.

Q Since this was money in a customer's --

A Mr. Block, may I make a suggestion on this?

Q No, I'd appreciate it if you would not.

A You can call other brokers.

Q You have the pink sheets?

A Yes. That only reflects the day before's prices.

Q But you have a range, at least, at that point, from the pink sheets?

A Yes, there is a range.

Q Supposing a man had an idea of what the market was, he would call -- even if he didn't -- strike that -- isn't it possible if you want to buy or you want to sell stock that you make a call to a brokerage house and indicate that you want to buy or you want to sell, isn't that correct?

A Yes.

Q If you indicate to the brokerage house that you want to sell to that house, isn't it true that there can be subsequent calls in which afer you have expressed an interest in a certain number of shares of stock you would get another call and that call would say, in effect, "You bought 50 shares or 100 sahres," or whatever?

A No. On the second phone call he has to ask you your price before he says you bought.

Q You can in that phone call, after he asked the price, and you have agreed or negotiated it, he says,

"You bought 500" or "You bought 20" after the price is established?

A If I want that amount of shares.

Q Isn't that the kind of phone call you had at these times when you talked about conversations with Mr. Deutsch and Mr. Duboff?

A When I talked to Mr. Deutsch or Mr. Duboff they told me I was buying the stock at "X" price. They did not ask me a price.

Q Did you receive all the telephone calls at New Dimension?

A No, I did not.

Q Is it possible that these calls that you received were second calls?

A No, not when I got them from Mr. Deutsch and Mr. Duboff in the morning before the opening.

Q You know about what happened the day before, is that right?

A When you say that, you mean the price?

Q You know about whether or not there had been a negotiation on shares of stock the day before?

A No, I don't know.

Q So that you may have been hearing the tail end of a conversation that started either a day before or

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A That is correct.

Q How were you paying for rent?

A I don't recall that.

Q Was it $30, $100, $500?

A I don't recall.

Q Where was the office located?

A 50 Broadway.

Q Is that in the Wall Street area?

A Yes.

Q And there are many brokerage houses in that area?

A Yes.

Q In fact, in that building?

A Yes.

Q And you don't recall what your rental was?

A No, I don't recall what I paid for rent.

Q Do you know whether or not any Bunker Ramo equipment was paid for by New Dimension?

A Yes.

Q For their offices at 38th Street?

A Yes.

Q Do you know whether or not bills were paid for the installation of telephone lines at 38th Street?

A Yes.

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bmv 1 Rothman-cross

THE COURT: You may proceed, Mr. Robson.

BY MR. ROBSON:

Q Mr. Rothman, I believe you testified that you met Mr. Deutsch and Mr. Duboff back in 1960 or 1961, when you were employed by a brokerage firm which they owned, is that correct?

A Yes.

Q At the time were Mr.Deutsch and Mr. Duboff just getting started in the brokerage business?

A They were in business for a while. I don't know whether or not they were just getting started.

Q That firm was a new firm they had just started?

A I don't know.

Q You don't know that?

A No.

Q You testified that Mr. Ryback contributed approximately $100,000 to the capital of New Dimension?

A Yes.

Q And that was the sole capital, was it not, which New Dimension was capitalized with?

A I believe later on, towards the end, Mr. Rybac: put more money into the firm.

Q Let's talk as of July 31st. That was the

capital of New Dimension?

A Yes.

MR. BLOCK: July 31, 1970.

Q 1970.

A I believe so.

Q Do you recall whether or not any portion of that capital was withdrawn by Mr. Ryback prior to July 31, 1970?

A No, it was not.

Q It was not?

A No.

Q So that at all times from the time you joined New Dimension until July 31, 1970, Mr. Ryback's $100,000 was in the firm, is that correct?

A Yes.

Q And if the firm lost any money or spent any money, he was risking his $100,000, is that correct?

A Yes.

Q Was one of your functions the preparation of trial balances for purposes of computing net capital?

A Yes.

Q How frequently did you compute trial balances?

Q Every month.

Q Is there any trial balance within any of the

records that have been identified thus far?

A I don't believe so. I didn't see one.

Q Where would those trial balances be maintained? Are they in a separate trial?

A It would be in a separate trial.

Q Were they part of any book?

A No. They were kept individually.

Q Did you have any occasion to see those trial balances while you were at the offices of the United States Attorney at any time during the nine visits --

A I don't recall seeing them.

Q They were not shown to you?

A I don't recall seeing them. I don't know if they have them.

Q In computing the trial balance, you include, among other things, as assets and liabilities, customer's balances, one way or the other, did you not?

A Yes.

Q Can you tell us how you would treat on the trial balance the $200,000 that was in the customer's account of Richard Packing Company?

A It would be kept in the customer account.

Q It would be an asset?

A It would be an asset to the customer.

Q And a liability to the firm?

A A liability to the firm.

Q Would you tell us how that would effect the net capital computation?

A We would charge off five percent of that at the time against the capital.

Q You would charge off five percent of what?

A Of the $200,000.

Q Can you explain what you mean by charge off?

A That would be deducted off the net capital of the firm.

Q In other words, five percent of that $200,000 would be a reduction of your net capital?

A Yes.

Q So that would provide a limitation on the available liabilities which you could incur, is that correct?

A Yes.

Q There came a time when you testified in 1969 you had a conversation with Mr. Deutsch about Mr. Ryback's new firm?

A Yes.

Q What is your best recollection, as you sit here now, as to when that conversation occurred?

A Yes.

THE COURT: You're beginning with the date you gave him.

THE WITNESS: The date we started work.

THE COURT: All right.

Q And thereafter?

A I don't know offhand.

Q How did you arrive at your estimate of twenty to twenty-five percent of the trades in Richard Packing?

A That is approximately how many times I answered the phone.

Q You don't recall how many calls you received but you recall you answered the phone twenty percent of the time?

A Approximately, yes.

Q Without knowing how many times --

A I picked up the phone approximately twenty percent of the time.

Q You picked up the call in the office approximately twenty percent of the time?

A Yes.

Q Is it your testimony that in twenty percent of the calls Richard Packing was mentioned?

A When M r. Deutsch and Mr. Duboff called, I

Exhibit 70-C.

(Pause.)

A I was short the end of February, short at the end of March; not until April was I long in the stock.

THE COURT: When did you go long?

THE WITNESS: In April.

THE COURT: Do you have a date, or can you not go beyond "in April"?

THE WITNESS: I would have to break it down day by day, your Honor.

THE COURT: In other words, you were short through March?

THE WITNESS: Yes, your HOnor.

THE COURT: 1970?

THE WITNESS: Yes.

Q Is there any way you can determine when in April you changed your short position to a long position?

A Approximately April 9th is when I would have gone long in the stock.

Q For our purposes later, can you indicate to me how you can determine as of the end of each month what the short position was?

A At the end of the month, where it says "sold," there is a figure showing that we were short 772 shares

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A No, I did not.

Q Do you know whether or not Mr. Ryback was indebted to Mr. Duboff in any amount at the time this bill was paid?

A No, I do not.

Q You have no idea, do you, why Mr. Ryback paid that bill?

A No, I don't.

Q Mr. Ryback, however, was the sole proprietor of New Dimension Securities, was he not?

A Yes.

Q And all of the funds in that company belonged to him?

MR. FEFFER: Objection, your HOnor.

THE COURT: Sustained.

A As far as I know, yes.

THE WITNESS: I'm sorry, your Honor.

THE COURT: I will strike the answer. The jury will disregard it.

Q To your knowledge, there were no other stockholders of New Dimension Securities?

A No, there wasn't, to my knowledge.

Q All decisions were made by Mr. Ryback, is that right?

A To my knowledge, yes.

MR. FEFFER: Your Honor, what type of decisions?

MR. ROBSON: No further questions, your Honor? Is Mr. Feffer not happy with the answer?

THE COURT: Plesae, Mr. Robson. It's not necessary for you to get involved in any colloquy.

You have completed your cross-examination, Mr. Robson?

MR. ROBSON: Yes, sir.

THE COURT: Very well.

You may proceed, Mr. Feffer.

MR. FEFFER: I am going to be about fifteen minutes, your Honor.

THE COURT: That is perfect. Then we will have this witness finished and we will go to lunch.

I have a completely unanimous jury on this subject.

REDIRECT EXAMINATION

BY MR. FEFFER:

Q What type of decisions were made by Mr. Ryback which would affect New Dimension?

A Could you please break that down a bit?

Q For example, who made the decision, as far as you know, as to what prices to trade securities at?

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MR. SEGAL: I am going to object to this line as immaterial.

THE COURT: No. I will tell you, Mr. Segal, there was considerable inquiry about the telephone activity, how many times he answered the phone, how many times relative to Richard Packing.

I think there is a certain latitude that I should permit on redirect in this area.

MR. ROBSON: Your Honor, I never asked him how many times he answered the phone. I asked him how he knew that he spoke to somebody about Richard Packing. He volunteered that he spoke on the phone twenty percent of the time.

I didn't ask him that question. I don't think every time the witness throws something in that he wasn't asked it opens the door to cross-examination.

THE COURT: I don't think it pays for you to make a speech every time you object,Mr. Robson.

The jury will disregard the last comment of counsel.

The objection is overruled.

A I believe in my earlier testimony I stated that Mr. Deutsch and Mr. Ryback -- Mr. Deutsch and Mr. Duboff called in the morning and set the prices for the

pink sheets.

Q Was that with respect to all the stocks that were traded at New Dimension Securities?

MR. BLOCK: Objection.

A In the beginning --

THE COURT: Overruled.

Q In December, January and February?

A Yes.

Q Did Mr. Ryback make this decision then, or did Mr. Deutsch and Mr. Duboff?

MR. SEGAL: Your Honor --

THE COURT: Sustained.

We have gotten an answer. Let's get on with it.

MR. SEGAL: Your Honor, I ask that the last answer of this witness be stricken.

MR. FEFFER: The answer of the witness, your Honor?

MR. SEGAL: Whose answer would I ask to be stricken?

THE COURT: For what reason, counsel?

I overruled an objection which Mr. Block made. Are you calling the answer not responsive?

MR. SEGAL: I am calling it not responsive,

AFTERNOON SESSION

2:25 p.m.

THE COURT: Mr. Block, I will hear from you.

MR. BLOCK: If your Honor please, I respectfully move at this time to strike from the testimony of thelast witness, Somer Jack Rothman, all his testimony and the exhibits relating to the placing of the $200,000 by Richard Packing Company in a customer account with New Dimension Securities Corporation, and I point out to your Honor in connection with that as the basis of my motion to strike, that, in the first place, there isn't a word in the information with respect to this.

In the second place, in the light of what was developed on cross examination, both by myself and Mr. Robson, it is very clear that this was a completely innocent and routine transaction which in no way could be deemed to be in furtherance of any conspiracy with respect to Richard Packing Company stock, and I remind your Honor that this money was customers' money, subject to be returned at any time, that it played no role whatsoever, according to the testimony of the witness, and I think your Honor could even take judicial notice of it because I went into the matter clearly through the Underwriters Trust Company -- that it played no role whatsoever in any

of the trading engaged in by New Dimension Securities and, further, that it even represented a disadvantage to New Dimension in that it required New Dimension to have more capital funds, as Mr. Robson elicited in connection with talking about the net capital ratio, with which I'm sure your HOnor is entirely familiar.

Now, your Honor, it seems to me that what we are interested in here, and I certainly have no objection to any evidence that the government adduces that is probative or something, but here the evidence is not probative of anything whatsoever and it seems to me that to leave it in in the present state of the record, and this is the record, is highly prejudicial as far as my client is concerned and I therefore ask that this motion be granted in all respects.

THE COURT: Mr. Feffer?

MR. FEFFER: Your Honor, I think we have gone over this before, with respect to the $200,000, but just to repeat:

The $200,000 was received, I believe, in late -- the check was dated late December --

THE COURT: December 31st, if my memory is correct, and it appears to have been deposited early in January of 1970.

bmv 3

MR. FEFFER: That money was maintained in the New Dimension Securities account at Underwriters Bank for a period of several months and then it was returned with gradual payments, 75, 25, figures in that amount.

THE COURT: It was returned by five checks between April 24th and July 2nd of 1970.

MR. FEFFER: That fact, your Honor, coupled with Government's Exhibit 37, on which Mr. Milton Cohen's name appears as an owner or potential owner of New Dimension Securities, to the extent of twelve percent, makes that $200,000 at least arguably having been used by New Dimension for that purpose, to be used by the business as a contract, for whatever reason they may want to use it, and realizing that Mr. Cohen wanted the money back.

THE COURT: It is interesting to note, Mr. Block, that the $200,000 was retained by New Dimension for periods varying from four to seven months. I note the same dollar amount, $200,000, which was advanced, was returned, which would lead me to conclude that no interest was paid for the use of this money and I should think that having $200,000 in cash in a relatively inactive trading account in a brokerage firm would have been highly beneficial to assist that brokerage firm in continuing its operations, particularly at its beginning stage.

It is interesting to note, too, that from what I can determine, this deposit of $200,000 was twice the capital contribution of the alleged sole owner of the business.

In view of all the facts --

MR. BLOCK: May I say two more things before your Honor rules?

THE COURT: Yes.

MR. BLOCK: If your Honor please, to hold Exhibit 37 --

THE COURT: Leave Exhibit 37 to the side, gentlemen. You have not heard me mention Exhibit 37 as I was summarizing the relevant facts.

You may address yourself to my comments and although they have not been completed, I think I set for some general factual content.

MR. BLOCK: I didn't mean to interrupt, but before your Honor ruled I wanted to get in one other thought, that the fact that there was no trading in this account it seems to me is attributable to what we heard from other witnesses, to wit, that the over-the-counter market had turned downward. We have had varying testimony about it, but the essence of the testimony is that starting in '69 and continuing through '70, the over-the-counter market turned down, and this was an over-the-counter house, and it stands to reason that this was a good-faith putting up of the money.

I never heard that you get interest on a customer's trading account.

THE COURT: Inactive, $200,000 in cash, never used for a period of from four to seven months? I would like to see how many fledgling brokerage firms, such as this, could walk in with a customer who says, "Here, never dealt with you before, but here is $200,000 in cash. Put it in my trading account and I will let you know when I am prepared to trade," when they can trade on seven days.

I think it would be unduly naive of this Court to strike this testimony.

I have indicated only very briefly, and I was

cut off, and I think I have said enough for the record, my own feeling that this $200,000 transaction was germane, pertinent to the case, as I see it, and therefore I deny your motion.

Bring in the jury, please.

Off the record.

(Discussion off the record.)

(Jury present.)

THE COURT: Good afternoon, ladies and gentlemen.

MR. FEFFER: The Government calls Stanley Muchnick.

S T A N L E Y M U C H N I C K, called as a witness by the Government, being first duly sworn, testified as follows:

MR. ROBSON: May I have a moment to confer with Mr. Feffer, your Honor?

THE COURT: You may.

(Pause.)

MR. FEFFER: Maybe we can uncall Mr. Muchnick, your Honor.

THE COURT: It sounds like we may have a stipulation in the works. If counsel have agreed on the matter, we can hold Mr. Muchnick a moment and if it is agreeable to both of you, then we can stipulate and

June 30th and probably around September or October.

Q Of 1970?

A Yes.

Q You don't recall specifically, though, do you?

A I would have to refer to that.

Q Can you tell by looking at it when it was prepared?

A Well, our opinion indicates that we completed all of our field work on December 20, 1970, except September for some additional information up through March 15, 1971.

MR. ROBSON: If your Honor please, I object to the document.

MR. BLOCK: If your Honor please, I would like to state my position at the side bar.

THE COURT: You may.

(At the side bar.)

MR. BLOCK: If your Honor please, I object to it as going far beyond the issues involved in this case, and I am saying that recognizing the government is relying on certain statements as to the number of franchises, but I have taken the position that the alleged misrepresentations as to the franchises in and of themselves are beyond the scope of the information in this case and my objection

is predicated on that fundamental objection.

THE COURT: Mr. Segal, you join Mr. Robson in his objection?

MR. SEGAL: Yes, your Honor.

MR. ROBSON: May I add one point to what Mr. Block said? Aside from the fact that I think this evidence is beyond the scope of the indictment, this balance sheet would not tend to prove ord disprove any of the facts which are being alleged as misrepresentations. The testimony has indicated that some time in early 1969 and some time during the middle of 1969 and I think possibly once in February of 1970, statements were made by somebody or other about the number of franchises which were sold and the number of franchises which were sold or as to which valid contracts, existed on June 30, 1970 is not even a little probative of how many franchises were sold in February of '69, August of '69 or February of '70.

There has been testimony that franchises were cancelled. Mr. Kally testified that because of various problems franchises were cancelled, land was not obtained, buildings not put up in accordance with the contracts, and so forth. Even on the theory that this witness is the proper one to testify, his testimony doesn't cast any light on the truth of the representations.

A Would you repeat the question?

MR. SEGAL: I object to it on the basis of the term "entered into."

THE COURT: Overruled.

A Would you repeat the question?

Q Yes.

Do you know, Mr. Brodkorb, as of or at June 30, 1970, how many franchise license agreements Richard Packing had for Circus Wagon Restaurants?

A I believe it's eight license agreements.

Q Do you know how many restaurants that included, or how many restaurants?

THE COURT: How many Circus Wagon Restaurants?

A Twenty-seven, I believe.

MR. FEFFER: Can I have this marked 13-B-1.

(Government's Exhibit No. 13-B-1 was marked for identification.)

THE COURT: This testimony is being received subject to connection as to Mr. Deutsch and Mr. Duboff.

MR. FEFFER: Your Honor, if that is your Honor's ruling, then I am going to -- I didn't understand that at the side bar as to these questions; I thought as to the report itself.

THE COURT: At the moment, as to these as well.

*****

A My recollection would be approximately ten.

Q That would be in addition to what is included on 13B-1?

A That's correct.

MR. FEFFER: Your Honor, if I may, I would like to give the witness a copy of the 13 for identification, just to hold in front of him.

THE COURT: If counsel do not have objections--

MR. ROBSON: I have objection.

THE COURT: Then you will have to wait until you find out whether he has a recollection.

MR. FEFFER: Fine, your Honor.

Q Do you know what the net income was, if any, of Richard Packing for the year ended June 30, 1970?

MR. ROBSON: Your Honor, I object on the ground that it's completely outside the scope of the issues of this case.

MR. BLOCK: I object.

THE COURT: Overruled.

A I would have to refer to the report. I do know there was a net income earned by the company.

THE COURT: In other words, you don't have a clear recollection of what it was?

THE WITNESS: Exactly? No.

read from the document, your Honor.

THE COURT: Mr. Segal --

MR. ROBSON: Your Honor, we are now doing by indirection what was --

THE COURT: I indicated they could do it on a selective basis, if the witness could testify. He has a right to refresh his recollection. These are numbers and you can cross examine him at length, if you desire.

I'm sorry, I didn't get the figure.

THE WITNESS: $127,363.

Q Are you able to tell the Court and jury how much income that is per share of Richard Packing stock?

A It would be fifteen cents per share of common stock.

Q Did Richard Packing Company ever sell its meat packing facilities?

MR. SEGAL: Objection.

MR. BLOCK: I am going to object to that, if your Honor please.

THE COURT: I will sustain an objection to form.

MR. BLOCK: My objection goes to the substance, your Honor, and I would like to be heard on that.

THE COURT: You will not be heard. We will

proceed. We had a lengthy discussion on this subject yesterday. There is an objection and it has been sustained as to form, but you may inquire on the subject.

Your question is too broad, sir.

MR. ROBSON: Your Honor, I assume all this is being taken subject to connection as to Mr. Duboff?

THE COURT: It is taken subject to connection so far as Mr. Duboff is concerned.

MR. SEGAL: And Mr. Deutsch?

THE COURT: No, I am not so sure about Mr. Deutsch. I have been reviewing this case at considerable length--

MR. SEGAL: I object to this discussion in front of the jury, your Honor.

THE COURT: All right, subject to connection as to Mr. Deutsch. I don't want to stop for a side bar on this.

Q Did Richard Packing have certain meat packing facilities in 1970?

A Yes.

time when those facilities --

MR. ROBSON: Is the witness testifying from his own knowledge or what he saw in the books and records?

THE COURT: Let's find out.

THE WITNESS: I can't testify from my own knowledge.

Q When did you come to Richard Packing Company?

THE COURT: He has testified to that, hasn't he?

THE WITNESS: Yes, I have.

THE COURT: Do you want to ask it again? Go ahead.

Q When did you come to Richard Packing Company?

A April of 1970.

Q At that time were there any meat packing facilities?

A Yes.

Q Did there come a time when these facilities were sold?

MR. ROBSON: I object unless it is within the terms of this indictment and has something to do with this case.

THE COURT: Why don't you take the positive side of it?

MR. ROBSON: I object to your Honor assisting the prosecutor and presenting the evidence in this case. I hate to say this, your Honor, but I must.

THE COURT: I can appreciate your being uneasy

at this point, Mr. Robson, and I am not assisting anyone.

MR. ROBSON: Your HOnor, I am not uneasy at this point.

THE COURT: You will sit down, sir.

MR. ROBSON: I am not the least uneasy.

THE COURT: Then sit down. Ask your question properly, sir. The jury will disregard the last exchange, completely wipe it out from your minds.

Q Did there come a time after 1970, in April, when the facilities which you have spoken about were sold by the company?

A Yes.

Q When was that?

A On or about JUne 30th of 1970.

Q How much was realized net on that sale?

MR. ROBSON: Objection, if your Honor please.

THE COURT: Overruled.

A There was a profit realized in the amount of $178,000.

Q Was that figure, the $178,000, included in the net income figure that you testified to?

A It is included in the net income figure, yes.

MR. ROBSON: Your Honor, I object to this whole line of questioning. I would like the record to indicate that.

THE COURT: I suggest you object regularly, if you choose to.

MR. SEGAL: I join in the objection, your HOnor.

MR. BLOCK: I join in it too, your Honor.

THE COURT: Overruled.

Q Without taking into consideration the proceeds realized from the sale of the maet packing facilities, what was the net income of Richard Packing as of June 30, 1970?

MR. BLOCK: Objection.

MR. SEGAL: Objection.

THE COURT: Overruled.

A There was no net income, in fact, and there was a net loss sustained.

Q What was that net loss?

A It would have been approximately $51,000.

MR. ROBSON: Objection.

Q What is that per share, if you know?

MR. ROBSON: Objection.

MR. BLOCK: Objection.

MR. SEGAL: Objection.

THE COURT: Overruled.

A It would have been a loss of six cents per share.

Q During the year June 30, 1969 to June 30, 1970 did Richard Packing have any subsidiaries or associated companies?

MR. SEGAL: Objection.

THE COURT: Sustained.

Q Are you familair with a company called --

Q Have you examined the books and records of Richard Packing Company from July 1, 1969 through July 30, 1970?

A June 30, 1970.

Yes, I have.

Q Did you have an occasion to examine the books and records of Richard Packing Company with respect to theloan that you testified to?

A Yes, I did.

Q Based on this examination, can you tell the Court and jury what application Richard Packing made of the $691,000?

MR. BLOCK: If your Honor please, I object to that. That is wholly without the issues in this case.

THE COURT: Sustained.

MR. FEFFER: Your Honor, I am just referring to the three exhibits I passed up.

THE COURT: I know you are.

Q Are you familiar with a company called Resort Products?

MR. SEGAL: Objection.

THE COURT: Mr. Segal, I know you made an objection previously, but there are exhibits in evidence and I am going to overrule your objection, because this

was gone into.

MR. ROBSON: I join in that objection.

MR. BLOCK: I do, too.

THE COURT: Mr. Robson, you are on a different footing, and I will overrule your objection, and I will overrule that of Mr. Block as well.

A Yes, there was a --

Would you repeat the question?

(Question read.)

A Yes, I am.

Q Was there a relationship of any type between Resort Products and Richard Packing Company?

MR. BLOCK: I object to that, your Honor.

THE COURT: Overruled.

A There was a relationship, yes, financial relationship.

Q What was the nature of that financial relationship?

MR. SEGAL: Objection.

THE COURT: Overruled.

A Resort Products was a subsidiary of Richard Packing Company but not a wholly-owned subsidiary.

Q Was there any other financial relationship between the two companies?

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MR. SEGAL: Objection.

MR. ROBSON: Objection.

MR. BLOCK: Objection.

THE COURT: If you know.

THE WITNESS: I do know.

Q What was that?

A There was an investment made and an advance made by Richard Packing Company to Resort Products.

Q What was the amount of that investment?

MR. SEGAL: Objection.

THE COURT: Overruled.

A The investment --

MR. SEGAL: May we have a date on this, your HOnor?

THE COURT: Yes.

Q As of June 30th.

THE COURT: Please. I don't think that was appropriate, Mr. Feffer.

MR. FEFFER: I'm sorry, your Honor. I was trying to give an outside date.

THE COURT: I don't want that to happen again.

MR. FEFFER: I'm sorry, your Honor.

MR. ROBSON: Your Honor, I would like the witness directed not to answer what the records showed

as of a date.

The question was, when was the loan made?

THE COURT: If you know.

A I do not know specifically what date the loan or loans were made.

Q What is your best recollection?

A The loans were all made during the year ended June 30, 1970.

Q What was the total amount?

MR. ROBSON: Objection.

MR. SEGAL: Objection.

MR. ROBSON: I move to have the answer stricken as there is no indication it is relevant.

THE COURT: Overruled.

A Would you repeat the question?

Q What was theamount of the advance?

A I don't know an exact amount. I can say it was in excess of $1,000,000, including both the investment and/or the advance made.

Q How much was the investment?

A The investment would have been, or is, pardon me, $75,600.

Q And the advance?

A I can only -- I can't recall specifically, but it would have been approximately $950,000.

Q Was that in the form of a loan?

A Yes, it was.

Q Was there any interest?

MR. SEGAL: Objection.

MR. BLOCK: Objection.

THE COURT: Sustained.

Q Did Richard Packing make any other investments during the year June 30th -- from July 1, 1969 through June 30,1970?

MR. SEGAL: Objection.

MR. BLOCK: I object to that.

THE COURT: Sustained.

Q Do you know how much money was put into the franchising program during that time period by Richard Packing Company?

A No. Specifically, no.

Q Do you have any idea?

A No, I do not.

A That's correct.

Q In connection with the actual figures set forth on the balance sheet and the statement of income, each of those pages set forth that the accompanying notes are an intregal part of the financial statement, isn't that correct?

A That's correct.

Q Those notes which are stated to be an intregal part of the financial statement included notes 2 and 3 which were only completed as fo March 20, 1970, according to that certificate, isn't that right?

A That's correct.

Q Then is it fair to say that that report was not available for distribution by Richard Packing Company to whoever they wanted to distribute it, until after March 20th of 1970?

A That's correct.

Q There is a certain lag, is there not, that is necessary before an annual report can be completed after the close of the fiscal year, isn't that correct?

A Yes, sir.

Q What is the normal lag? In other words, the last entry for the year is made by the bookkeeper for the company on June 30, 1969. That is the date we are talking

(Jury leaves the courtroom.)

THE COURT: Gentlemen, before you leave, I do want to see you a moment. We don't have to be on the record.

Off the record.

(Discussion off the record.)

(Recess taken.)

THE COURT: You may proceed, Mr. Block.

BY MR. BLOCK:

Q Now, you testified on direct examination, sir, that as of June 30, 1970, the company, Richard Packing Company, had entered into eight franchise license agreements for twenty-seven Circus Wagon restaurants. Do you recall that, sir?

A Yes, sir.

Q I show you 13B-1, these yellow work papers of yours, and I call your attention to the fact that there are more than eight references here to franchise agreements, isn't that correct?

A That's correct.

Q How many are listed on 13B-1 in toto?

A There is reference to sixteen executed agreements or potential agreements.

Q In addition to that, there is a listing of

some more where it says that no agreements were signed, isn't that correct?

A That would be included in the sixteen.

Q You have sixteen listed, all told, is that correct?

A Correct.

Q Can you explain, sir, how it is that in the light of sixteen you stated that as of June 30, 1970 there were only eight?

A Eight agreements as of June 30, 1970, had either been cancelled and the money refunded or had never been entered into at all, but there had been discussions about specific agreements, but there are eight that no action at all was taken or had been cancelled, for different reasons.

Q Where did you get that information from?

A From Richard Packing, their books and records, and the specific franchise license agreements.

Q Were there some changes that occurred, as far as accounting is concerned, in connection with the way franchise agreements would be counted? Had there been any developments in the accounting field in that respect?

A Yes, there were changes instituted by the accounting industry, yes, as far as franchise income, yes.

Q As far as franchise income --

A The recognition of franchise income.

Q All right. Do you recall the dates with respect to those changes?

A Specifically, no. I can only --

Q Can you give us an approximation, reasonable approximate?

A The rules and regulations that the accounting industry wanted to see instituted, first would have come from the American Institute of CPA's. Secondly, I believe the date it was officially pronounced was in the spring of 1969 for official institution some time in the latter part of '69. The American Institute follows the policy of first announcing what they intended to do, giving the CPA's an opportunity to review it, making comments back to the American Institute, and then if there are no changes thereafter made, they issue a final announcement and the date it is to be effective, and I believe the effective date was in the fall of 1969.

Q And that was the first pronouncement with respect to the matter of franchise income, is that correct?

A That is my understanding, yes.

Q So what we are talking about now is the crucial date, the fall of '69?

A Yes.

Q The fall of '69?

A Correct.

Q Prior to the fall of 1969, what had been the practice of accountants as far as franchise income was concerned?

THE COURT: If you know.

A I know from reading and examining other reports of accountants doing work on franchise companies there had been a variety of methods used; some conservative, some liberal.

Q Can you give us some examples of what you are talking about as far as the liberal interpretation?

A Well, a liberal interpretation would include, if I may use this as an example (indicating) -- I have seen instances where monies paid or committed to be paid for a franchise license agreement has been picked up in total in the statement of income by companies engaged in the sale of franchises, and in cases where very little work had been done, no work had been done, the liberal interpretation would include the complete recognition of income at the time the agreement is signed, with little or no follow-up.

THE COURT: That would be current income, rather than deferred?

THE WITNESS: That is correct.

Q Is what you are saying, by way of example, that if a franchise is sold, and, let's say, the purchase price of the franchise is $20,000 and there is a down payment of $2,000, are you saying that under the

liberal interpretation that flourished up until the fall of 1969, that that $2,000 would be treated as current income?

A That's correct.

Q And that would be regarded as a complete franchise; is that correct?

A That's correct.

Q What would be the effect under the liberal interpretation of the whole $20,000 that had to be paid? Would that $20,000 be treated as income, and now I am talking about the liberal interpretation, even though only $2,000 had been paid down?

A That is correct.

Q So they would have taken the whole contract price?

A That is correct.

A As income?

A That's correct.

Q And that was true under accounting methods up until the fall of 1969?

A Yes, sir. That was one approach.

Q What we are talking about now is the way accountants were supposed to treat the matter; isn't that correct?

A That's correct.

Q Because this new rule that came into effect in the fall of 1969 was binding upon CPA's, isn't that correct?

A The new rule?

Q The new rule you are talking about with respect to the way to treat income was binding upon CPA's?

A that is correct.

Q It, however, obviously was not binding on business men?

A I would agree.

Q How about the method of calculating the number of units involved in a particular franchise licensing agreement, and, in that connection, so we are not talking in a vacuum --

MR. BLOCK: Please mark this.

(Defendant Cohen's Exhibit LL was marked for identification.)

Q I show you LL for identification.

Can you identify this as being a franchise agreement that you reviewed in connection with the preparation of that report?

A Yes, it is.

Q And is this an agreement between Richard Packing

Company as the licensor, Richard Franchise Investment, Inc., Status Marketing Corporation, and Marketing Syndicate, Inc.?

A Marketing Syndicating, Inc., was the licensee, isn't that correct?

A That's correct.

MR. BLOCK: I offer it in evidence.

MR. FEFFER: No objection, your Honor.

MR. SEGAL: No objection,your Honor.

MR. ROBSON: No objection.

THE COURT: Received.

(Defendant Cohen's Exhibit LL for identification was received in evidence.)

MR. BLOCK: I would just like to read part of this to the jury, [illegible] Honor.

THE C[illegible]J

(Mr. Block reads to the jury from Defendant Cohen's Exhibit LL in evidence.)

Q Now, sir, did you count, or did you take account of that particular contract, LL, on compiling 13-B-1?

A Yes, I did.

Q Did you count the units and, if so, how many units did you show were covered?

A I did count the units. I only counted three

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for this particular agreement.

Q Are you sure about that, just three?

A Yes.

Q Let me ask you this: Under the liberal interpretation that was in effect until the fall of 1969, could that agreement have been treated as an agreement for fifteen units?

A It could have been, yes.

Q Now, you talked, sir, about a loss sustained by Richard Packing Company as of June 30, 1970; isn't that correct? You answered Mr. Feffer's questions about that?

A Yes. It is a loss.

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Q Yes. I just want to direct your attention to the subject.

A Right.

Q Was not that loss attributable in part to the exclusion from income of franchise fees under that ruling that went into effect in the fall of 1969?

A I would agree, yes, it was.

MR. BLOCK: If your Honor please, I'm sorry, but I have to approach the side bar with counsel.

(At the side bar.)

MR. BLOCK: Judge, Mr. Feffer, on direct examination of this witness elicited -- this was over objection -- elicited an answer to the present condition of Richard Packing Company. I will defer to your Honor's notes on that.

What did he say precisely, the witness?

THE COURT: My recollection was that he asked a question, the essence of which was, was Richard Packing in existence or in business today. And my note indicates that an answer was forthcoming to the effect, Richard Packing was not in business today.

The objection, so that the record is clear, that is my recollection of yesterday, no objection was interposed to the question.

THE COURT: If you want to make it a project --

MR. BLOCK: That's all I have in mind.

THE COURT: They asked the question and you have a right to make a brief inquiry.

On redirect I suggest you must limit yourself to not going beyond the very narrow area that I am indicating to Mr. Block.

(In open court.)

MR. BLOCK: I have no further questions.

CROSS-EXAMINATION

BY MR. SEGAL:

Q Mr. Brodkorb, did you ever meet Bernard Deutsch?

A No, I have not.

Q Did you ever, during 1969 or 1970, ever communicate any information to Mr. Deutsch with regard to Richard Packing Company?

A No, I did not.

Q Or Richard Franchise, or Circus Wagon?

A No, sir.

MR. SEGAL: No further questions.

THE COURT: Thank you, Mr. Segal.

Mr. Robson.

CROSS-EXAMINATION

BY MR. ROBSON:

Q Let me ask you the same questions with respect to Mr. Duboff.

Did you ever meet him?

A No, sir.

Q Have you ever spoken to him?

A No, sir.

Q Have you ever delivered any information to him?

A No, sir.

Q You testified on direct examination with respect to the income of Richard Packing Company as of June 30, 1969; is that correct?

A It would be for the year ended June 30th.

Q For the year ended June 30, 1969.

Are you able to state what portion of that income, or what portion of any losses that company sustained occurred during any particular month in that fiscal year?

A Yes, I could. I could say this, that the extraordinary income realized by the company on the sale of the meat packing facilities occurred in June of 1970, so therefore, prior to that, there had been an operating loss.

Q Are you able to state which months the operating losses occurred?

A No, sir.

Q How much of it occurred in June? How much in May? How much in April?

A No, sir.

Q In other words, you are unable to state whether or not, for example, as of February the company may have been earning substantial profit but had losses after February; is that correct?

A I cannot answer that question.

Q In other words, most of the losses could have occurred in any one of those months?

A That's right.

Q You prepared this financial statement finally, or you completed your work finally and prepared a financial statement sometime in March; is that correct?

A Basically in December, except for additional information in March.

Q When you testified with respect to certain figures as of June 30, 1970, were you in any way modifying those figures, and don't tell us how, but were you in any way modifying those figures as a result of things which occurred subsequent to June 30, 1970?

A There could be no modification of the figures as presented in the report, no. The only modification

Q Under the liberal accounting standard that you have spoken about, would those additional options have been included as units?

A They could have been, yes.

Q Even though they were unspecified in number?

A This is specified.

Q What is the number there?

A An additional twelve.

Q That is how you get the figure of fifteen?

A That's correct.

Q With respect to this new accounting standard, liberal accounting standard, I should say, what else was Richard Packing's loss attributable to, other than the change in the accounting procedure that you spoke of?

MR. BLOCK: I am going to object to that,if your Honor please.

THE COURT: Let me hear the question.

(Question read.)

THE COURT: If you can answer thequestion, I will permit you to do so.

Objection overruled.

A I would have to refer to the report, if I could. I do have one here.

Q Fine. Can you refer to the report, and I will

ask you if it refreshes your recollection.

MR. BLOCK: Your Honor, I'd like to press that objection, because I don't think my question opened any doors at all.

THE COURT: If you combine yours with the very brief inquiry by Mr. Robson, I think there is a limited area where the Government can inquire. At least this is my recollection of your questions and his.

MR. BLOCK: This is just an open-ended inquiry, the question that has just been asked.

That is my objection to it.

THE COURT: Overruled.

MR. ROBSON: I want to make it clear I object also.

MR. SEGAL: And I object, too.

THE COURT: Yes.

Overruled.

THE WITNESS: Could I have the question repeated?

(Question read.)

THE COURT: I will adhere to my prior ruling.

MR. SEGAL: I'd, just for the record, indicate that the questions are based upon an examination by Mr. Block which merely spoke about method of accounting for or not accounting for certain franchises, but did not

address itself specifically to the issue of that as a basis of loss for the company. It was a matter of accounting whether or not some should be or should not be excluded.

THE COURT: That is why I added the comment that although his examination was very brief, Mr. Robson did ask, to my recollection, at least two questions which could be said to be in, and to relate to, this area of inquiry. I would hope the Government's examination will not be lengthy --

MR. FEFFER: No, your Honor.

THE COURT: I will permit a question or two.

A The loss would have been attributable to, or could have been attributable to its --

MR. ROBSON: If your Honor please, I object to what "could have been."

THE COURT: Yes, indeed. That would be speculative.

If you cannot tell us what the loss was attributable to, I will not permit you to answer the question.

A I cannot answer the question.

Q Do the books and records of Richard Packing that you examined, do they reflect the basis of the loss?

A Yes, they do.

MR. SEGAL: I have no further questions, your Honor.

THE COURT: Mr. Robson?

MR. ROBSON: No questions, your Honor.

THE COURT: Mr. Feffer?

MR. FEFFER: I have nothing, your Honor.

THE COURT: You are excused. Thank you very much. Call your next witness, please.

MR. FEFFER: Ronald Frankel.

R O N A L D F R A N K E L, called as a witness on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FEFFER:

Q Mr. Frankel, by whom are you employed?

A I am employed by the Bass & Company.

Q What is your position with Bass& Company?

A I am a partner in the firm.

Q How long have you been so employed at Bass & Company?

A Eighteen years.

Q What are your responsibilities at Bass & Company?

A I supervise accounts and edit copy that's

attached to material that we prepare and release in behalf of clients.

Q What were your responsibilities in 1968 and 1969 and '70?

A The same as they are today. To supervise work for clients and edit and write copy.

Q Do you know a Milton Cohen?

A Yes.

QD Do you see Mr. Cohen in the courtroom?

MR. BLOCK: We concede, your Honor.

THE COURT: Yes. Conceded that Mr. Frankel knows Mr. Cohen.

Q Do you know Mr. Deutsch?

A Yes.

Q Do you see him in the courtroom?

A Yes.

MR. SEGAL: Conceded, your Honor.

THE COURT: Same concession.

Q Approximately when did you meet Mr. Cohen for the first time?

A It was about March or early April of 1969.

Q Where did this meeting take place?

A To the best of my recollection it was in our office at 111 Broadway.

Q Who introduced you to Mr. Cohen?

A I was introduced to Mr. Cohen by Mr. Deutsch.

Q Can you tell the Court and jury what Mr. Deutsch and Mr. Cohen said to you at this meeting?

MR. ROBSON: If your Honor pleas , I ask that this be taken subject to connection.

THE COURT: It will be subject to connection as to Mr. Duboff.

A That's pretty difficult to recollect. We talked about his company --

MR. BLOCK: If your Honor please, if the witness doesn't recall, he doesn't recall.

THE COURT: He didn't say that. Can you recall the substance of the conversation?

A We were going to handle his financial public relations account.

Q And Bass & Company is a public relations firm, is that correct?

A That's correct.

Q Thereafter did you begin to do work of that type for --

MR. SEGAL: I object.

THE COURT: Don't lead.

Q What did you do following this meeting with

respect to Richard Packing Company?

A We entered into a contractual relationship--

MR. BLOCK: Excuse me. There hasn't been any reference to the corporation that was just mentioned.

THE COURT: So far I have only heard about Mr. Cohen.

MR. BLOCK: That's all I have heard about.

THE COURT: I think you might back up a bit and take it one more step.

Q You indicated there was a contractual relationship. Who was that with?

A The contractual relationship between Bass & Company was with Mr. Cohen's company, Richard Packing Corporation.

MR. ROBSON: Can we have a date for that, if your HOnor please?

THE COURT: Yes, if you can give it to us. I think he indicated a general time, but can you be a little more specific?

THE WITNESS: I think our agreement was April, 1969.

Q I want to show you what's been received in evidence as 31A through 31F and ask you to look at these, and also 13A in evidence and ask if you can identify each

of these documents?

A Yes.

THE COURT: Do you have G there too?

MR. FEFFER: Yes, your Honor.

THE COURT: I thought you said F?

MR. FEFFER: I'm sorry, I meant G. 31A through 31G and 13A.

Q What are these documents? 13A first.

A One is an annual report that we prepared for Richard Packing Company.

Q And 31A through G?

A These are press releases that we issued on behalf of the company.

Q Can you tell the Court and jury the manner in which this material was prepared by Bass & Company?

MR. SEGAL: Objection. We have documents 31A through G and we have document 13A. There is one question asked as to everything.

THE COURT: It is your intention to or do you want to take them separately?

MR. FEFFER: I just want the general method in which these documents were prepared, your HOnor.

MR. SEGAL: I would object to that, your Honor.

THE COURT: If there was one general method which covers press releases and annual reports, fine. If there isn't, just say so before you start.

THE WITNESS: Your Honor, we would receive infromation generally from Mr. Cohen about an event that was generally called for preparation into news release form. And then it would be assigned to one of our writers and he would write it. I would edit it, and then it was issued for approval, a series of approvals before anything would be issued.

Q Who was it issued to for approval?

A Copies would be sent to Mr. Cohen, copies would be sent to Richard Packing's counsel at the time, and in most cases some were sent to Mr. Deutsch.

Q Did you ever speak to anyone else with resepct to any of these press releases other than people that you have mentioned?

A Which people do you refer to?

Q You mentioned Mr. Cohen and his counsel and sometimes Mr. Deutsch. Was there anybody else that you spoke to outside of the people in Bass & Company with respect to any of these press releases?

MR. SEGAL: Your Honor, I object. This is not the witness' testimony.

Q Other than those people.

THE COURT: All right. You're withdrawing yoru question?

MR. FEFFER: Yes, your Honor.

Q Did you speak with anyone --

MR. ROBSON: If your HOnor please, do I have an objection to this entire line of interrogation so far as Mr. Duboff is concerned?

THE COURT: This is all being offered at this time, this entire line, subject to connection as to Mr. Duboff, is that satisfactory, Mr. Robson?

MR. ROBSON: Yes, sir.

THE COURT: Very well.

Q I show you 31A in evidence and ask you to look at that. Did you speak to anyone with respect to that particular release?

A Yes. We received information from Mr. Cohen that the company was declaring or had declared a stock dividend. And if I remember correctly, I asked him for the record and payment dates, which are an essential part of a release. And he referred me to Mr. Deutsch, and I remember phoning Mr. Deutsch's office, he was not there, and I got the information, to the best of my recollection from Mr. Duboff.

CROSS-EXAMINATION

BY MR. BLOCK:

Q Mr. Frankel, has Bass & Company been in business for a few years?

A Yes. We have been in business for twenty-eight years.

Q Are you generally regarded -- and I ask you to shed any modesty in answer to this question -- as a well-recognized financial public relations firm?

A We are generally recognized as a well-established and responsible firm, yes.

Q Dealing in financial public relations?

A Yes.

Q Now, sir, we have quite a bit of testimony here about the annual report, and I show you 13-A and I would like to get some idea, if you know: Are you the gentleman who was pretty much in charge of the Richard Packing Company account?

A I supervised it, yes.

Q Was it the job of Bass & Company really to put the annual report into an attractive format for the company?

A It was our function to prepare the report from design, writing and concept stages and to supervise its printing.

2 rmmch Frankel-cross

Q This is something, is it not, that you routinely do for public companies; isn't that right?

A Yes, we do.

Q And there is a great deal of thought and work and effort that goes into an annual report these days or -- well, back in '68 and '69; isn't that correct?

A Most of the time, yes.

Q When you said that you had something to do with the formulation of the report, you, of course, didn't have anything to do with the financial data? That is all furnished to you by the company, isn't it, through its accountants?

A That's correct. The certified statements comes from the accountant and that is --

Q You don't have anything to do with that?

A We don't change that in any way, form or shape.

Q Please speak into the microphone.

Of course, these pictures that appear in the report and the layout generally, that is something that is your special dish of tea or talent, to recommend and lay that out, isn't that right?

A That's correct. We also recommend to the client that he get it done, that he get it out as soon as he can.

have it as part of our record.

They are marked approved by various members of the people they were sent to.

Q Did you always get back replies on approvals?

A We received phone replies; we received written replies.

Q Can you tell me, sir, who it was who instructed you as to mailing out of releases?

A I don't understand the question.

Q Did you receive any instructions with regard to the mailing of any releases?

THE COURT: I assume you mean Richard Packing Company releases?

MR. SEGAL: That's right.

THE COURT: Do you understand the question?

THE WITNESS: Well, we --

THE COURT: Did you have a distribution list or instructions?

THE WITNESS: Yes, we have our own list.

People or clients don't tell us who to mail them to. We know, we feel, better than they, who the releases should go to. They go to the press, and they don't know the press, basically.

Q With regard to the composition of any particular

A It's --

Q Is that so?

THE COURT: Can you answer that yes or no?

A It is not correct in our procedures.

Q Do you have any document which you received from Mr. Deutsch indicating either approval or disapproval of any item which you may have sent to him?

A We have documents in our files that --

Q My question is, do you have any document from Mr. Deutsch indicating his approval of disapproval of any correspondence you may have sent? The answer to that is either yes or no.

A I would say I can't be positive.

MR. SEGAL: I have no further questions, your Honor.

THE COURT: Thank you, Mr. Segal.

MR. ROBSON: I have no questions, your Honor.

THE COURT: Mr. Block?

MR. BLOCK: I have no questions, your Honor.

THE COURT: Mr. Feffer, any redirect?

MR. FEFFER: Just a few, your Honor.

REDIRECT EXAMINATION

BY MR. FEFFER:

Q Was the total bill paid for by Richard Packing

other persons?

A No, it is all pretty clear on its face as to who received material.

Q I didn't ask you whether it was clear on its face. 87A consists of a bunch of yellow sheets of paper. Can you tell us whether anyone of these sheets of yellow paper was ever sent to anybody else?

A At this yellow paper stage?

Q Yes.

A No.

Q It was not?

A No.

Q What was sent to somebody else was a final draft for which this was a work product?

A It was a retype of this (indicating).

Q 87A was never sent to anybody else? That was just a piece of paper used in the office?

A That's correct.

Q Can you tell from looking at 87A from whom, if anybody, any piece of information either typed or handwritten was obtained?

A If you're asking me, if I understand the question correctly, whether the information on this product came from -- is that correct?

would send it out for approvals.

MR. ROBSON: I object to 87A on the ground that it doesn't in any way indicate any relationship with any defendant in this case. I don't know, and nobody else does, where the information specifically came from on here. It certainly doesn't indicate anything more than what the wit= ness already testified that, that he got information from various sources and prepared papers.

MR. BLOCK: Your Honor, I spoke too fast before about no objection to A and all I am saying is that I would like to join in the objection just voiced by Mr. Robson, since I have had a chance to study the document.

BY MR. FEFFER:

Q Do you know outside of that document from whom, from what pecple, the information contained therein came from?

A Yes, principally from Milton Cohen.

MR. FEFFER: No further questions.

THE COURT: In other words, you didn't have a large book in your office that you took this information out of?

THE WITNESS: No, not at all.

THE COURT: Do you recall if you got the information from Mr. Cohen or someone else did?

THE WITNESS: This was written by our writer, John Ogilvie, and I assigned him the project much to his dismay --

THE COURT: Please.

That should be stricken and the jury will disregard it.

THE WITNESS: It was a formidable piece of work, and that was the basis for my comment. It had nothing to do with the subject matter. Annual reports are a big project.

THE COURT: You have indicated in response to Mr. Robson's questions that after this document was edited it was typed and sent out in some way; is that right?

THE WITNESS: That's correct.

THE COURT: You have it typed, the subsequent version that was sent out? Is that in evidence or has it been produced here?

MR. FEFFER: I don't believe it is in evidence, your Honor. I am not sure if we have the part that was sent out. It probably wouldn't be in their files.

THE WITNESS: It should be in our files, as part of our files.

THE COURT: Why don't you hand the witness the file, perhaps, and let him --

MR. FEFFER: The file is quite extensive, your Honor --

THE COURT: I would like to have produced, in view of Mr. Robson's questions, the subsequent documents, if they exist, and then I will rule on the whole thing on the matter of completeness, as well as relevance and materiality.

In other words, this indicates something happened to this document, and I would like the next document, or the end product, produced.

MR. FEFFER: May I try to assist the witness --

THE COURT: I think the witness is fully competent to take out the end product, and if it was sent to anybody, any covering letters that are there.

That is obviously the basis of the objection and I think it is a proper objection at this point.

THE WITNESS: This appears, your Honor, to be the retype of that yellow sheet (indicating).

THE COURT: Very good. Would you remove that and we will mark that for identification as Government's Exhibit 87-A-1? I want the end produce, and then we will show it to Mr. Robson.

3 rmmch Frankel

This is the typed version of the draft, with a covering letter; is that right?

THE WITNESS: Yes.

(Government's Exhibit No. 87-A-1 was marked for identification.)

MR. ROBSON: I object to 87-A, your Honor, but I would have no objection to 87-A-1, except subject to connection, of course, with respect to Mr. Duboff.

Frankly, I don't see any great relevance to 87-A-1. It doesn't establish anything, one way or the other.

THE COURT: I will overrule your objection to 87-A --

MR. BLOCK: Before your Honor rules, I have not had a chance to see 87-A-1.

THE COURT: Step up here, Mr. Block, and you may do so. I recall now that you withdrew your objection.

I suggest you may want to look at 87-A and 87-A-1.

(Pause.)

MR. ROBSON: If Mr. Block has no objection, I can proceed with my voir dire, your Honor.

THE COURT: Just one moment; let him look at that. If he wants a voir dire on that, I will allow it.

MR. FEFFER: Your Honor, for completeness, the

A Oh, yes.

Q And has it been maintained in the regular course of business of Bass & Company since the time when the entries were made thereon?

A Yes, because it resulted in a material change in the press release.

MR. ROBSON: If your Honor please --

THE COURT: No, the answer is "yes."

The jury will disregard the rest of the response.

Q Is it the regular course of business of Bass & Company to maintain such documents?

A Not usually, unless they are an important part of a particular release record.

MR. FEFFER: No further questions.

THE COURT: You maintained this one, is that it?

THE WITNESS: Oh, yes, because --

THE COURT: Don't tell me why.

This comes from your files?

THE WITNESS: Oh, yes.

THE COURT: Overruled. Subject to connection as to Mr. Deutsch and Mr. Duboff.

MR. ROBSON: Just one more question.

BY MR. ROBSON:

Q With respect to 87-B --

THE COURT: Are you back to -B?

MR. ROBSON: -B and -C.

Q With respect to 87-B and the yellow sheet on 87-C, do you personally know whether in fact these documents were mailed to Mr. Deutsch?

A No. I testified that the yellow was not mailed to anyone.

Q The final version of it?

A Right.

Q Do you personally know whether it was mailed to Mr. Deutsch, or are you merely testifying based on your assumption that since his name was on the list, it went?

A I said that being a dividend announcement --

Q All right. Excuse me.

With respect to 87-C, do you personally know whether the final version of that was mailed to Mr. Deutsch?

A For approval, you mean?

Q Yes. Do you personally know whether it was mailed?

A If I can rely on my assistant --

Q Do you personally know whether it was mailed?

A I would personally say yes, it was mailed.

Q You saw it mailed?

A We received --

Q Did you see it mailed?

A I don't believe I saw the envelope being put in the mail.

Q Did you see a covering letter with respect to it?

A It should be on the record, sir.

Q Did you see a covering letter? Do you recall ever seeing a covering letter with respect to it?

A I don't remember if I have or not.

MR. ROBSON: I object to 87-C, the yellow sheet, which is included therein.

THE COURT: Overruled. It will be received subject to connection to Mr. Deutsch and Mr. Duboff.

Q With respect to the various documents included in 87-D, did you personally mail any of the releases which are attached thereto to Mr. Deutsch or anybody else?

A I don't personally mail any releases.

Q Did you ever see a covering letter forwarding those releases to Mr. Deutsch or anybody else?

A I don't recollect having seen the envelope being mailed.

MR. ROBSON: I object to Government's Exhibit 87-D, if your Honor please.

THE COURT: Overruled. Received subject to

witness to answer questions and not make speeches --

THE COURT: Why don't you stop making speeches?

Mr. Frankel, he is interested in what you know of your own personal knowledge relative to a particular mailing. I want you to answer that question.

Do you have personal knowledge of a mailing, if you put the material in the letter box or if you see someone else do it? Do you have personal knowledge in that context of the mailing of that document?

THE WITNESS: No, I didn't see anybody put the envelope in the mail box addressed to a particular person.

MR. ROBSON: If your Honor please, I object to the exhibit with the exception of my subject-to-connection objection, to the white sheet and the carbon covering letter.

THE COURT: Overruled. It will be received subject to connection as to Mr. Deutsch and Mr. Duboff.

MR. FEFFER: May I refer to some of these exhibits, your Honor, to the jury?

THE COURT: Yes, you may.

(Government's Exhibits Nos. 87-A through -E for identification were received in evidence.)

THE COURT: I don't know if the Government is anxious to offer 87-A-1 for identification at this time or

operations of Richard Packing Company, other than --

MR. ROBSON: Is there an objection?

MR. FEFFER: Yes, your Honor.

THE COURT: No, I want to hear the question. If your objection is that Mr. Segal asked the question, I want to first hear the question and even if it's similar I am going to permit an answer.

Q Do you recall any single occasion in which you discussed with Mr. Deutsch the business operations of Richard Packing Company?

A No, not specifically as to a time or place.

Q Do you recall that there were any? Do you recall any specific subject at any time, at any place?

A It stands out in my mind we discussed generalities on occasion, but I couldn't be specific as to the time, the place or the particular item.

Q You did communicate with Mr. Deutsch, although I believe you testified he was not in, and you received a call subsequently from Mr. Duboff, about the stock split; is that correct?

A The stock dividend, yes.

Q The stock dividend.

And that, of course, was a financial, or a matter of corporate structure, rather than the business affairs

of the company; is that not correct?

A Yes.

Q And that is the kind of think you would expect to get from a brokerage firm or investment banker, is that not correct?

A In this specific instance, yes.

MR. ROBSON: I have no further questions, your Honor.

MR. FEFFER: May I have this marked as Government's Exhibit 87-A-2.

(Government's Exhibit No. 87-A-2 was marked for identification.)

REDIRECT EXAMINATION

BY MR. FEFFER:

Q Mr. Frankel, what other investment banking houses did you speak with in connection with clients' business?

MR. SEGAL: Objection.

THE COURT: Overruled.

A I really don't remember having spoken with any other, anyone else, to my knowledge; to the best of my remembrance.

Q I show you 87-A-1 and 87-A-2 for identification and ask you if you can identify both those documents.

If the material which you have presented now is all underlying or back-up material, 50, it may have another purpose as well, we'll get to that. But is the back-up material for the transactions reflected in 50?

MR. FEFFER: No, your Honor. It could be viewed as that, but for 50, the confirmation is as you will recall from the Denver funds were used for that purpose. These documents do go to the trades that I have just designated for Allessandrini. This is back-up material for the documents we discussed at the side bar before this witness came on. I believe it's 86.

MR. SEGAL: May we have an offer of proof as to the purpose for which this is being put in now?

MR. ROBSON: Some of these trading tickets were Naddeo and some weren't.

MR. FEFFER: They all were, your Honor.

MR. ROBSON: No, they're not. Some are with Loeb, Rhoades --

THE COURT: They seem to be Naddeo so far, in this group of 86.

MR. FEFFER: What happens is, as there's been testimony too and as these charts reflect, as of October, V.F. Naddeo drops off here and as Mr. Mazzeo testified, it was due to a dispute between himself and Mr. Duboff. What

happens then, is Allensandrini with whom we have heard testimony through Mr. Shwidock, through Mr. Rothman I believe as well, and Mr. Mazzeo, Allessandrini comes into the picture in terms of supplying Jaffee with funds and they come in only until New Dimension Securities is formed. Instead of Naddeo supplying Richard Packing stock directly to Jaffee for funds, the stock goes from V.F. Naddeo to Allessandrini.

MR. SEGAL: Did Mr. Deutsch do that too?

MR. FEFFER: It goes from V.V. Naddeo to Allessandrini, who was a market maker at this time, they are both market makers, to Jaffee. The result is that the price of Richard Packing is raised in the process for the profit that Allessandrini makes.

MR. SEGAL: Your Honor, is the government seriously arguing --

MR. FEFFER: Can I finish?

MR. SEGAL: This is like Kafka.

MR. FEFFER: I think I have said enough, your Honor. It's on the chart. It shows the way the stock got from Jaffee, how they picked the stock up. Instead of going to V.F. Naddeo, the big market maker, the stock goes to another market maker. In the process the price of the stock is raised.

THE COURT: My recollection of the information is

THE COURT: If they establish a co-conspiracy, Mr. Segal, you would I think agree with me that they do not have to establish that your client was privy to each and every act in furtherance of that conspiracy.

MR. SEGAL: But your Honor, they do --

THE COURT: You concede that of course as a matter of general law?

MR. SEGAL: No question. But they have to also answer to this Court and perhaps also as to why it was that the grand jury may never have returned these people as co-conspirators. If the government is going to make convenient evidentiary admissibility situations for themselves by willy-nilly labeling everybody in the Street a co-conspirator, then of course we would be responsible for them. But the question is, are they in fact; was that ever presented to a grand jury; can the government by fiat just make any other brokerage house with whom we have no specific connection or control, co-conspirators of course.

MR. ROBSON: More important, your Honor, is there any evidence in the record at that late stage which we assumed was going to be the last day of the trial, that Allessandrini, that Naddeo was a key conspirator? These people have testified that they made any attempt to, they never agreed with anybody, there was not one word brought out by the

government that Naddeo did anything improper, that Rothman did anything improper that anybody did anything improper. The government cites here, they say he is a co-conspirator, they say now we can put it in excess, a co-conspirator, we'll take it subject to connection. We are still out waiting to find out who are the co-conspirators, and what did Mazzeo conspire with anybody? In what way with Kelly, Andrews & Bradley?

MR. BLOCK: We haven't heard any principal of Allessandrini. This man is not a principal.

MR. FEFFER: What happened here was, Naddeo sells the stock to Allessandrini. It is not kept in Allessandrini. It is sent immediately to Jaffee & Company, and the price is raised in that process by half a point.

MR. BLOCK: So what?

MR. FEFFER: That's number one, your Honor. They could have gone to Naddeo & Company, Jaffee, to get the same stock, because Naddeo & Company was the market maker.

THE COURT: You say this creates the appearance of market activity?

MR. FEFFER: Absolutely, your Honor, Jaffee had a responsibility, your Honor --

MR. ROBSON: They should have filed an indictment against every brokerage house in the City of New York.

THE COURT: Why don't you let him finish, Mr.

correct?

A That's correct.

Q Just to make sure that the record is accurate, when you were testifying before, you were saying that the sum total of the records that you turned over to the U.S. Attorney's Office represented the trading in Richard Packing; is that correct?

A That's correct.

Q But that the documents in evidence, 86-A and 86-B, represent a portion of that trading; is that correct?

A That's correct, sir.

Q And specifically for the months November '69 and December '69?

A Yes, sir.

Q Do you know of your own knowledge for whom Allessandrini made purchases of Richard Packing?

A For whom?

Q Yes.

A All I can tell you is what's on here. We bought stock from various brokers. We sold stock to Loeb, Rhoades & Company for the account of Jaffee.

Q Did you sell Richard Packing to anyone other than Jaffee & Company? Richard Packing?

A Not in 1968 and '69.

MR. FEFFER: I have no further questions.

A Excuse me. Not November '69 and December '69.

RECROSS-EXAMINATION

BY MR. SEGAL:

Q Mr. Chazan, you indicate you know what months it was that stock of Richard Packing was sold to other brokers besides Loeb, Rhoades.

A I don't have those in front of me.

Q But there were others?

A Yes, I'm pretty sure there were.

Q Do you know for what months these other trading records exist?

A If you will allow me to look over here, I think maybe I can locate it from the tickets.

Q What I am asking, Mr. Chazan, is months other than those months which are represented by those tickets.

A There were trades, and I'm sure there were trades with other brokers in subsequent months.

Q But those have not been produced, at least here in this courtroom?

A I don't see them here.

Q Do you know how many shares of stock there were involved in this other trading with other brokerage houses?

Q And is it the regular course of business of Financial Programs to maintain such documents and records?

A Yes.

Q With respect to 63F, G, and H, were these documents prepared in the regular course of business of Financial Programs?

A Yes, they were.

Q Was it the regular course of business of Financial Programs to maintain those documents?

A Yes.

Q Were they in fact maintained by Financial Programs?

A Yes.

Q Did you produce these documents to the United States Attorney's office?

A Yes, I did.

MR. FEFFER: The government offers, your Honor, 63A through 63H.

MR. SEGAL: May we come to the bench, please, your Honor?

THE COURT: Yes.

(At the side bar.)

MR. SEGAL: Your Honor, I have requested this bench conference because I wanted the record to show the caliber and the quality of the prosecution that we are being

subjected to. The government knows that shares of stock were sold out at a dollar. They also know that the market at that time was $10. Yet the government chooses here to bring a witness not one those who makes a decision about sending them out; rather, the bring the witness as an afterthought who they had to recall because he proved to be a good, safe witness in the first place, to just get in bare documents. With the government arguing an inference here that it should not be allowed to argue if it is going to be presenting a fair case.

There is an obligation in a prosecution not to bring to the attention of the jury those things in favor of the defendants, but there certainly is an obligation to try a case and to try it on the basis of the inferences that are fair, not the innuendos which it can sock into the record through what are at this point business records which can't be cross examined, and introducing a business record through an individual who has no idea about what if anything went into the decision to make these sales. The rejoinder to that is, you can call the witness. And that is so. But I think that there is something which is a little abhorrent, if there is such a thing as a little abhorrent.

There is something abhorrent about the way the prosecution through insidious methods attempts to get before

the jury information which does not reflect the facts; not as the government knows them and certainly not as we know them. There is one thing about being so hungry to get a conviction that you pull out all stops, and that I would urge reaches a point where it no longer becomes a prosecution under the juris prudence that we hope we are all preserving; rather, it becomes a guilt by assocation and an innuendo.

I wanted to put this on the record because I am disturbed by it. It is going to mean a prolongation. It is going to mean that we are being forced to call a witness who is probably going to be hostile to us, and a witness whom the government with a tactic is hoping will open up doors to other pieces of information which could be deleterious to the defendants.

I believe too that the government is under some obligation besides just making cute tactics. I must say that this is the lowest kind of approach to a case where the United States government in all its integrity is supposed to be seeing justice and seeking a search for truth.

MR. ROBSON: I would likt to say simply Amen, and I would like to point out that in addition to the fact that the market price was much higher than what the selling price was, as indicated on the confirmations, the government is aware of the fact that the brokerage firm that purchased the stock was able to sell the entire block over a period of a few weeks for substantially more than this price. I think the average price was between five and ten dollars a share.

Some of the stock was sold within a matter of a couple of days after this at a substantially lower price. We have reason to know why the fund did this and we suspect the government does too. The fact of the matter is that with that fact being in the record, for the government to introduce this, leaving the impression somehow the stock fell apart and only $1 a share could be received for it, is a very unfair position for the government to take, when they have the same facts in their possession that we have.

MR. BLOCK: Your Honor, I want to join in what was said by co-counsel. In addition, I would like to point out that all of these trades were made subsequent to the last date in the information, what was it, July 1st --

THE COURT: I think the information speaks of a period, so we are clear on it, from on or about July 1968

to on or about July 1970.

MR. BLOCK: These trades were made as late as September, I see --

MR. FEFFER: That's the settlement date.

MR. BLOCK: So this is August 26th -- 63D for identification involves a trade on August 26th. 63E for identification involves a trade on the same date. 63A for identification, 7/27.

MR. FEFFER: July 27th.

MR. BLOCK: Same date on 63B for identification, and with respect to 63C, the date is July 28th, 1970.

I wanted to add one more thing, your Honor, and that is that --

THE COURT: I would like to add something in the meantime:

It would appear to the Court, as I look through the confirmations, tha t the sales in July and August were all at the same $1 a share.

MR. BLOCK: There is another thing, Your Honor, and that is that the Court can take judicial notice that if a fund dumps 156,000 shares on the market all at one time, it is chaos, and I don't think it proves anything and I cannot see this as being in furtherance of any conspiracy. I think it is wholly inadmissible. This is a predicate for another

chart showing alleged losses sustained by the funds.

THE COURT: There is such a charge in the information --

MR. BLOCK: No, chart, your Honor, not charge.

Your Honor, on all the grounds urged by co-counsel and myself, I ask all this evidence be excluded.

MR. SEGAL: Your Honor, I want to add for the moment that the business of losses here doesn't really quite fit with any of the evidence that has come in. The fund people have testified to the fact that these were decisions that were made, they were reviewed and they were re-reviewed constantly. They chose to put themselves into a position where they drained out most of the market and kept most of the float as part of what was their usual procedure in something that they wanted to do. They have not indicated and there has been no testimony that they indicated that they were misled or that they purchased as a result of anything but their own dedision and these are particularly sophisticated individuals.

The decision to sell out at the time they sold out when there was in fact a market of $10 a share and when averaging out might make their losses much less, puts this case and puts this loss, as evidenced by the $1 a share sale, into a complexion which is completely opposite to what

the actual facts were. They could have sold these at a brief period of time, a little bit at a time, and they could have strung it out so that there would have been a gradual and orderly market made and kept.

There is no indication by any of the evidence up to this point that we were responsible for either the purchases or the decisions that they made. They were wholly made by sophisticated people on their own and kept over a long period of time and, as they indicated, they wanted to keep them for a period of three years. Why they changed their minds and acted as they did cannot be laid at our doorstep, nor can an act by fiat be attributed to these defendants.

MR. FEFFER: Something that strikes me is this:

We get a speech or statement by Mr. Segal accusing thegovernment of misconduct and then he represents on the basis of this record that there was re-review by the funds in the purchase of Richard Packing, he represents that he can't understand why Mr. Hurley purchased the stock, that had nothing to do with the defendants, nothing to do with Mr. Deutsch, Mr. Cohen.

Well, your Honor, that is just hogwash. That is just a misrepresentation of what this record has spoken for. Forgetting that, Mr. Segal sits here and says there is a market of ten, and I presume he is referring to pink sheets --

MR. SEGAL: I am referring to what the resale was to the company that bought the shares.

MR. FEFFER: Does Mr. Segal have one document to show that on these particular dates these shares could have been sold for ten? Your Honor, I would like to see such documents. I think Mr. Block put it right where it belongs:

These funds made a decision when they realized what they were holding, and I might add Richard Packing is no longer in business -- they made a decision to get rid of the shares of stock and there is a shareholder who will appea who is holding Richard Packing stock and the value is zero. For Mr. Segal to say they made a mistake is wrong. These funds purchased Richard Packing on the basis of representations made to them, press releases, conferences with Deutsch and Cohen, and that they were buying a viable company and they believed it. If that was a crime, that was a crime, but Mr. Hurley testified, Mr. O'Meara testified that these people believed Mr. Deutsch and believed Mr. Cohen, that they were buying into a viable company --

MR. ROBSON: I defy him to show us one statement in this record by Mr. Hurley or anybody in the funds -- there is not one word of testimony that the purchases were made because of --

MR. FEFFER: May I finish?

MR. ROBSON: I can't stand to be here and listen to lies.

MR. FEFFER: Mr. Hurley after going to Las Vegas in April of 1969, he comes back and calls Mr. Deutsch and tells Mr. Deutsch"I have spoken to Mr. Cohen. I like Mr. Cohen, I like his products, what he has, and I am buying because of that," and that is in the record.

MR. ROBSON: Is that a misrepresentation, that he likes Mr. Cohen and thinks he is an intelligent man and has a good idea. What you're saying is an outright lie. Nobody bought on the basis of representations.

MR. FEFFER: What he is saying Mr. Cohen and Mr. Deutsch had nothing to do with the purchasing of Richard Packing Stock. I am saying there is abundent evidence on that point.

The point is that Mr. Segal made a representation that the market price was ten. Mr. Segal has made an accusation against the government and I would like him to show that on these dates these funds could have sold for 10. The funds makes a decision they were holding stock of a company that was worthless and was going under. We have, your Honor the confirmations that exist here. This is what we showed them --

MR. ROBSON: You have records showing the sales

by this brokerage firm.

MR. SEGAL: Do you deny you have sales records of Doyle, O'Connor?

MR. FEFFER: Well, that is not the point, your Honor. The funds obviously made a decision, no matter what it is based on, to get rid of Richard Packing stock, and they did it, and Richard Packing Company today is worth zero, it is a non-entity.

If in hindsight, your Honor, they could go out and could have sold 15,000 shares here, 5,000 there, 10,000 there, 10,000 here, that can be argued by defense counsel. Defense counsel can bring that up. They were holding a company they knew was going under. The market price went from the 50's to 4 or 5.

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THE COURT: Let's take this one step at a time.

Number one, I am going to permit you to offer this evidence and, for better or for worse, the defense can come back and rebut it in whatever way they see fit. That's what we are talking about at this side-bar conference.

The next point is whether anyone requests any limiting instructions relative to sales which occurred in August of 1970.

I am going to permit all of the confirmations and ledger sheets to go in, but if you want certain limiting instructions on this matter, I will hear you here at the side bar.

MR. FEFFER: I would say the sales that took place in August, the Government relies on United States v. Franchesi, written by Judge Friendly, and under those circumstances no limiting instructions are required.

THE COURT: I am aware of that case, but it is not an act in furtherance of the conspiracy and I would like to hear if counsel want limiting instructions. I am not saying I will charge the way they indicate, because I will admit the documents in evidence. I will hear them and I may say something to the jury.

Mr. Block?

MR. BLOCK: Maybe if counsel conferred, we could

join in something. I don't want to try to give you something off the top of my head. I think it is important.

If you give us a couple of minutes, or maybe let Mr. Feffer continue -- you want to give the limiting instructions at the time it comes in, so give us a moment to talk it over, please.

THE COURT: All right.

Off the record.

(Discussion off the record.)

MR. BLOCK: If your Honor please, I think all counsel agree with me that the admission of these records are so devestating to the defendants that no limiting instructions will help and we, therefore, do not request any limiting instructions.

THE COURT: Very well. The objections of all three counsel have been noted on the record.

They are overruled. I will take this material subject to connection as to all three of the defendants.

MR. SEGAL: Your Honor, the "subject to connection" is a bit confusing to me at this point, since this material is coming out after the period of the conspiracy. I am not sure --

THE COURT: If you would like me not to make a statement -- you see, if you follow Franchesi, it would

our case after your Honor has made the decision to receive evidence subject to connection --

THE COURT: In view of the comments, I think you have preserved your objections in the record and I have overruled those and I will admit these exhibits.

MR. ROBSON: Your Honor, so that I can attempt to structure a request to charge with respect to this information, can you advise us for the record of the purpose for which it is being admitted? It is apparently not being admitted as evidence of the conspiracy since it is not alleged to be part of the conspiracy or in furtherance of the conspiracy. I am not sure what the purpose of the submission is and I know the indictment says they lost money, but that doesn't make anything admissible, and there has to be a theory.

I am puzzled as to what the theory is.

THE COURT: Let me tell you the way I see the evidence:

The information charges basically a manipulation, an inflation of the price, accompanied by purchases by the Funds.

The stock thereafter declined and the Funds sold and a loss resulted. The Government's theory, as I understand it, is that the loss resulted from the initial

Q The records do not indicate in any way that Naddeo had any knowledge that Allessandrini was going to resell these shares to Jaffee; is that correct?

A That's correct.

Q By the same token, there is nothing in any of the records to indicate that Jaffee, when it purchased from Allessandrini, had any knowledge that those shares had been acquired from Naddeo; is that not correct?

A That's correct.

Q On various dates prior to those sales to Allessandrini, there is an indication that numerous brokers purchased from Naddeo; is that correct?

A Yes.

Q Did you check at any time to ascertain to whom those brokers resold that stock, if they did, and for what prices?

A Only one of them.

Q Which one is that?

A The sales by Naddeo to Loeb, Rhoades for the account of Jaffee.

Q Other than the sales to Loeb, Rhoades for the account of Jaffee?

A No.

Q You did not?

A No.

Q So you do not know whether their sales were at higher prices, lower prices, than the sales to Allessandrini or what relationships they bear; is that correct?

A That's correct.

Q On these charts, you have set up the purchases by date and the sales by date, and they are sort of opposite each other; is that correct?

A Excuse me.

Which chart are you referring to?

Q I am on 86 for the moment. That is the one we have been talking about.

A Could you repeat the question?

Q On those charts you have set up sales and purchases by dates; is that correct?

A Yes.

Q And you have alongside of each other purchases made on a particular date and sales made on a particular date?

A That's correct.

Q For example, you were asked, I think, about June 2, 1969, and you indicate that there were certain purchases on June 2, 1969, and certain sales on June 2, 1969; is

that correct?

A Yes.

Q This chart does not indicate, does it, however, that the shares which were purchased on June 2, 1969 are the same shares which were sold on June 2, 1969; does it?

A No, the chart doesn't indicate that.

Q In fact, is it not true that on many occasions Naddeo was short stock when it made sales and then acquired that stock subsequently to cover its short position?

A On occasions Naddeo was short. I don't know how many occasions.

Q With respect to Exhibit 83, is it not also true that the purchase dates and the sales dates do not mean that the same stock was sold on a particular date as the stock which was purchased on that particular date?

A That's correct. It could be short sale gain.

Q And, in fact, if there was a short position of any substance, that short position would have to be covered by subsequent buying; is that not correct?

A That's correct.

Q And when a broker like New Dimension sold stock short, it would be taking a risk, would it not, of being able to buy that stock subsequently at a lower price than

it sold it?

A If they sold short.

Q If they sold short?

A Yes, if they sold short.

Q As a matter of fact, if they sold short, it would be desirable, would it not, for the stock thereafter not to rise in price until they had covered that short? Is that not correct, from an economic point of view?

A Generally, yes.

Q You mean there would be occasions when they'd want it to rise so they would have to pay more than they sold it for?

A No --

Q You didn't mean generally; you meant always?

A I meant generally.

Q On the dates when you have indicated sales by New Dimension to Loeb, Rhoades for the account of Jaffee, do you have any knowledge on any of those dates what prices were being charged by other brokers to either Jaffee or anybody else for those shares, for shares of Richard Packing?

A Yes, if there are sales on Government's Exhibit 86 on the same day with other brokers, then I'd know of other sales.

Q If there were sales by Naddeo on the same date, you would know of that?

A Yes.

Q Other than the sales by Naddeo, do you have knowledge of what sales were made by other brokers who were trading that stock and at what prices?

A Well, by Allessandrini, which is on the end of Government's Exhibit 86, I have knowledge of sales by Allessandrini.

Q Right --

A So we have Naddeo, New Dimension and Allessandrini.

Q Allessandrini only on those dates when it sold to Loeb, Rhoades for the account of Jaffee stock which it had purchased from Naddeo; is that correct?

A In respect to Allessandrini, that's correct.

Q You do not know what Allessandrini sold its stock at on any other date, do you?

A There are some exhibits which are in evidence. Allessandrini firm trading accounts, which would show other dates of sales.

Q You have not prepared a chart of that, have you?

A No, not in addition to what shows on Page 11 and 12.

Q Do you know how many other brokers were making

elv 1 ***** Austin-

MR. SCHATTEN: The government calls Frank Austin.

F R A N K A U S T I N, called as a witness on behalf of the government, being first duly sworn, testified as follows:

MR. BLOCK: Your Honor, may we approach the side bar?

THE COURT: Step up.

(At the side bar.)

MR. BLOCK: If your HOnor please, I was just handed 3579 which I have had a chance to read, and 3580, which I haven't had a chance to read, and I assume that the contents of this is what the government is going to attempt to prove, and I object to it most strenuously on the part of my client, Mr. Cohen, as being extremely prejudicial to him, and if your Honor is disposed to admit the testimony I would ask for a severence at this time.

MR. SCHATTEN: Your Honor, if I may respond --

MR. BLOCK: Let the judge read it.

(Pause.)

MR. SCHATTEN: There's been testimony to the effect that Mr. Cohen's firm, Richard Packing, put $200,000 into New Dimension. This witness will elicit the nature of the work this man did on the townhouse, East 38th Street, and one of the issues in this case will be the nature of the

testify with respect to everything that went on in the California office, about the townhouse improvements, about Mr. Deutsch and Mr. Duboff.

THE COURT: Anybody else want to say anything?

MR. BLOCK: I'd just like to say that beating this dead horse about Richard Packing Company opening a trading account with New Dimension, getting its money back, and on the strength of that, does that open the door to allow this extremely prejudicial evidence in against Cohen? That's my point, your Honor. I say that it does not.

THE COURT: If Mr. Cohen is in fact found to have been involved in a conspiracy with Mr. deutsch and Mr. Duboff and a portion of that conspiracy would be the establishing and the continuation of business of New Dimension Securities--

MR. BOCLK: There is no evidence of that.

THE COURT: I think there is enough for the jury to draw inferences. Let me suggest this:

You have made your objection. I assume that counsel for the defendants join in the objection. The objection is overruled.

MR. SEGAL: Your Honor, I want to place on the record something that I have not -- I have not spoken yet. The government seems to misinterpret what its function is in putting a witness on the stand. They always indicate that

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and liked my work, my colors and my feeling --

MR. SEGAL: Your Honor, can we just have conversation?

THE COURT: Yes. Apparently Mr. Deutsch was talking about interior decorating?

THE WITNESS: Yes, to do his offices.

THE COURT: He asked you that?

THE WITNESS: Yes, sir.

THE COURT: Tell us what he said to you.

THE WITNESS: I will.

So he signed a lease and took a space, and I then proceeded to the interior design --

MR. SEGAL: I object, your Honor.

THE COURT: Yes, let's go back. The jury will disregard the last of it. I want you to the best of your recollection tell us what was said at that second meeting where Mr. Deutsch was present. Just tell us what was said.

THE WITNESS: Okay. Mr. Deutsch was staying several times apparently in Los Angeles and said he wanted office space to work out of rather than work out of his hotel. So he looked at the office and asked me to do the interior design.

MR. SEGAL: Your Honor --

THE COURT: All right. Let's disregard everything

except that Mr. Deutsch asked the witness to do some interior decorating.

Q Did you have occasion to do work for Mr. Duetsch in Los Angeles?

A Yes.

Q Where was that work done?

A In Century City.

Q What was the work that you did?

MR. ROBSON: Can we find out when, if your Honor please?

Q Whe n was the work done?

A The work began in the fall of 1969, the construction, it was bare space and it had to have lighting and decorating and the complete -- it's like space without walls, they had to construct it. It was a new building.

Q What was the work that you did?

A Well, I did Mr. Deutsch's office, a small conference room and a small receptionist-secretarial area.

Q How much did the work cost?

A Approximately 100 to 120 thousand dollars.

Q Whose offices were they?

A Dimension Management, Mr. Deutsch's office.

Q Did you have occasion to do --

MR. SEGAL: Your Honor, I ask --

MR. SCHATTEN: I was in the middle of a question, your Honor.

MR. SEGAL: Your question interrupted my statement.

THE COURT: Please, you know you're not supposed to direct yourself to counsel, Mr. Segal. If you have an objection, make it.

MR. SEGAL: I would ask that that last statement be stricken, your Honor.

THE COURT: He said "Whose office was it?"

MR. SEGAL: Yes.

THE COURT: Is that what you want to strike?

MR. SEGAL: Yes, your Honor.

THE COURT: We'll strike that and let you go back and tell us what he saw, what he heard.

Q Did you have a conversation with Mr. Deutsch in which --

THE COURT: The jury will disregard that matter of whose office it was.

Q -- in which there was discussion as to whose offices --

MR. SEGAL: Objection.

Q --whose offices --

MR. SEGAL: Objection.

MR. SCHATTEN: Can I finish the question?

THE COURT: Don't lead him.

Q Did you have a discussion with respect to the question of --

MR. SEGAL: Objection.

THE COURT: Overruled.

Q -- whose offices --

MR. SEGAL: Your Honor, why don't we write it out, your Honor?

THE COURT: Let's not engage in that, Mr. Segal.

Q Did there come a time when you had a discussion with Mr. Deutsch with respect to the offices on which you worked?

A Yes.

Q When did that conversation take place?

A Well, we discussed the total part of it, and the rest of it was when I was first engaged and made a business deal with Mr. Deutsch, Dimension Management, and proceeded with the work and completed the job.

MR. SEGAL: Your Honor, I ask that that be stricken. The question was, "When was that conversation?".

THE WITNESS: I gave part of it, your Honor, and I am--

MR. SEGAL: Your Honor, I ask that the witness be admonished not to --

THE COURT: Let's not get into that. The last part of the answer is stricken. Go back, start over, and do it right.

Q Did there come a time when you had a conversation with Mr. Deutsch as to whose offices you were doing the work on in Los Angeles?

THE COURT: Overruled.

A Yes.

Q When did that conversation take place?

A That took place when Mr. Deutsch engaged me in 1969, about October.

Q What did Mr. Deutsch say to you and what did you say to Mr. Deutsch?

A Mr. Deutsch told me that he was taking offices because he needed the space because he was going to be doing work out of Los Angeles under Dimension Management and that I was to build and decorate like I would a normal client.

Q Did there come a time when you completed your work at the offices in Los Angeles?

A Yes, I did.

Q Did you have occasion to do any additional work for Mr. Deutsch?

A Yes, I did.

Q Where was that?

A In New York City.

Q Where in New York City?

A At 124 East 38th Street.

Q What was the nature of the work?

THE COURT: Let's go back one step. When? When did you do it?

THE WITNESS: Well -- your Honor, when did I have occasion to meet in the beginning?

THE COURT: Well, did you have a conversation with Mr. Deutsch about doing work in New York City?

THE WITNESS: Yes.

THE COURT: When?

THE WITNESS: Well, no, the first happened in Los Angeles. Mr. Deutsch and Mr. Duboff and Ryback were there and Mr. Diamond, and work was completed in Los Angeles --

Q Let me stop you. Who was Mr. Diamond?

A My business partner.

Q What was the name of the offices out in Los Angeles that you did work on?

A Dimension Management.

Q Where did this conversation take place, the one you're talking about in Los Angeles?

A It took place in the new completed offices.

Q Who is Mr. Diamond?

A My business partner.

Q Would you tell the Court and jury what you said, what Mr. Deutsch said and what Mr. Duboff said at this time?

MR. ROBSON: When was that, your Honor?

Q When the conversation took place.

A I'd say approximately -- I'd have to check -- but I'd say January, December, 1970 -- 1969 --

THE COURT: December, '69 or January of '70?

THE WITNESS: Yes, that would be about right. When they were completed, and I guess through billing dates I could find that out. In other words, when I installed the job and accessorized the job, everybody took a look to see how I completed it.

THE COURT: You had a conversation in Los Angeles with Mr. Deutsch and Mr. Duboff and Mr. Diamond, your partner, was present?

THE WITNESS: And Mr. Ryback and maybe somebody else, I don't know.

THE COURT: Will you tell us what was said at that time? This is offered subject to connection as to Mr. Cohen.

THE WITNESS: I will try. They told us they were going to take these townhouse offices and I was going to be

decorating in New York City for them, and that Mr. Duboff didn't care too much the way I decorated it and Mr. Deutsch liked the way I decorated it, and so then -- we had a discussion, anyway, I came to New York City --

THE COURT: Let's stop right there. Did you tell us now about all the conversations that you had in Los Angeles where you were told about this townhouse office in New York?

THE WITNESS: Yes.

THE COURT: You may ask your next question, Mr. Schatten.

Q Did there come a time when you visited the townhouse on East 38th Street?

A Yes, there did.

Q When was that?

A That would be about February, 1970.

Q Who was present at that time?

A My self, my partner, Mr. Diamond, Mr. Ryback, Mr. Deutsch, Mr. Duboff and I think that would be the principal people.

Q Did you have a conversation at that time?

A Yes, I did.

Q Please tell the Court and jury what you said, what Mr. Deutsch said and what Mr. Duboff said.

THE COURT: This is subject to connection as to Mr. Cohen.

A The townhouse was a Stanford White townhouse a very famous architect, so it was of classical architecture. So we discussed renovation of the house and what we were going to do with it. It was a home and it was being made into offices, an apartment and such. We discussed how we were going to do it and what should be done, at that first time.

Q Did you have any other conversation at that time?

A Yes, we continued, the next day. Mr. Duboff's taste was much more conservative and traditionally-minded than Mr. Deutsch's. It's like putting two people together when you're working for them. I had to relate to Mr. Duboff's taste and Mr. Deutsch's taste and try to compromise in a traditional townhouse.

MR. SEGAL: Your Honor, I would ask that that interesting dissertation be stricken.

THE COURT: It's not responsive and I will strik it. Try to listen to the questions because we have certain rules of evidence here. Try to answer the question as asked, no more or no less.

THE WITNESS: I'll try, but it's hard.

Q You told us about the first conversation when

you were at the townhouse.

A Yes.

Q Did you have additional conversation with Mr. Deutsch and Mr. Duboff on the subject of the decoration of the townhouse?

A Yes, I did.

Q Please tell the Court and jury what you said to Mr. Deutsch and what they said to you and when and where it took place.

A It took place in the townhouse after what I said before --

MR. ROBSON: Can we find out when?

A Yes, that would still be February. That Mr. Duboff would like me to go see the offices that he was presently working at the Mr. Jaffee & Company, I know that, and that it was done traditionally with paintings and horse drawings, and done in English taste. And Mr. -- I'm trying to shorten it, it's hard --

THE COURT: Don't shorten it. Just tell us the way it happened.

THE WITNESS: Mr. Deutsch likes much more modern and contermporary taste. So against we are back to an argument. They asked me at this time if I would come up there and see it. But not to mention that I did work for them on

Dimension Management or that I am a decorator because they are in business some place. So I went there.

Q Where did you go?

A I went to Mr. Jaffee & COmpany.

Q Did there come a time when you reached agreement with Mr. Deutsch and Mr. Duboff on the work to be done on the townhouse?

A Yes.

MR. SEGAL: Your Honor, I am going to object to that as leading.

THE COURT: The answer is in. Don't lead from this point on, please.

Q What was the work that you did on the townhouse?

A I did the complete interior decoration, remodeling --

MR. SEGAL: Your Honor, may the witness be asked to stop his dissertation when I stand up? I am going to object to this until we get a time.

THE COURT: Let me explain something to you, Mr. Austin. We operate here under rules of evidence. You are asked a question to which you are expected to respond. As I said before, don't answer any more or less. When one of the attorneys stands, that indicates he is about to make an objection. You should hold your answer

at that point, let him make his objection, I will indicate to you whether you can answer it or not, and we will get along fine.

THE WITNESS: Thank you. Can I get a glass of water?

THE COURT: Yes. As a matter of fact, we will all get something at this point. Lunch. It's 12:30. I made a promise to the jury and I am going to keep it.

Ladies and gentlemen, we will take a lunch break of an hour and ten minutes. The jury is dierected as always not to discuss the case among themselves nor to remain within the presence of any person who may be discussing the case, and of course to continue to keep an open mind on all facets of the case. The jury is excused and is directed to return at 1:40 p.m.

Counsel are also excused. The witness may stand down.

(Luncheon recess taken.)

p.m. elv

AFTERNOON SESSION

1:50 pm

(In open court - jury present.)

THE COURT: Good afternoon, ladies and gentlemen. I hope you enjoyed your luncheon hour. You are going to resume now with the continued direct examination of Mr. Austin, and as I said this morning, I have hopes that this day will see the close of the government's case.

You may proceed, Mr. Schatten.

DIRECT EXAMINATION CONTINUED

BY MR. SCHATTEN:

Q Mr. Austin, I believe that before the luncheon recess we were talking about a meeting at the townhouse in February of 1970. Who was present at that time?

A Mr. Deutsch, Mr. Duboff, myself, Mr. Ryback, and I think that is the main principals.

Q Can you speak up a little louder?

A All right.

Q Did you have a conversation with Mr. Deutsch and Mr. Duboff at that time?

A Yes, I did.

Q Would you please tell the Court and jury what you said in that conversation and what Mr. Deutsch and Mr. Duboff said in that conversation?

A Well, that conversation, I guess Mr. Deutsch and Mr. Duboff together, we discussed the --

MR. SEGAL: Your Honor, I am going to object to any "I guess."

THE COURT: Yes. Don't guess. Tell us what you recall.

THE WITNESS: Okay.

A I recall the following:

That I was going to go over to Jaffee & Company to see the offices of Mr. Jaffee, his personal office, to see the interior design work there and to see how the traditional way it was decorated. Mr. Deutsch and Mr. Duboff at this time told me not to mention when I go over there, that I had done previous work for Dimension Management and New Dimension Securities and that I was a decorator and going to be decorating this new townhouse. Just to go and take a look.

Q Did you have occasion to do work on the townhouse?

A Yes, I did.

Q What was the work that you did?

A Well, I did the furnishings, the decorating and supervised with the construction and remodeling.

MR. SEGAL: Can we have a time on that?

THE COURT: Yes, when did you begin work on the

townhouse?

THE WITNESS: Just about the end of February, I would say, would be about correct.

Q February of 1970?

A 1970.

Q What was the total cost of the work that you did on the townhouse?

A Approximately 300 to 350 thousand dollars.

Q Do you know if there was a child's bedroom in the townhouse?

A There was no child's bedroo. in the townhouse.

Q Do you know a Mr. Ralph Yandoli?

A Yes, I do.

Q How do you know him?

A Well, when we were doing the construction, Mr. Deutsch engaged him to be the contractor to do the remodeling work and the plumbing and putting in that, you know, the construction work; contractor.

Q Do you know what work Mr. Yandoli did on the town house?

A Yes, I do.

MR. SEGAL: Objection, your Honor.

THE COURT: The answer is no. Don't lead the witness from this point on.

Q What was the work that Mr. Yandoli did?

A He did the following thing:

He removed partitions and walls, put in new partitions, put in the swimming pool, fixed the elevator, put in lighting, worked under the architect's and my supervision.

Q I want to show you what has been marked Government's Exhibit 77 for identification and I ask you, can you identify that?

A Yes, I can.

Q What is it?

A It is a proposal from F. P. Austin Company regarding the purchases of furnishings and accessories for the townhouse.

MR. SCHATTEN: The government offers this document at this time, your Honor.

MR. ROBSON: Your Honor, in addition to the objection on the ground of relevancy and materiality, I also call your Honor's attention to the fact that it appears to be on its face both an incomplete and unexecuted document.

MR. SEGAL: Your Honor, I join in the objection.

MR. BLOCK: I join in the objection, your Honor.

THE COURT: Sustained.

MR. SCHATTEN: Your Honor, may I renew my position

THE COURT: Your apology is accepted. I have ruled, gentlemen.

(End of side bar.)

BY MR. SCHATTEN:

Q I show you what is now Government's Exhibit 77, in evidence. I ask you, did there come a time when you had a conversation with Mr. Deutsch and Mr. Duboff with respect to that document?

A Yes.

(Government's Exhibit 77, received in evidence.)

Q When was that?

A Well, that would be about the first part of June.

Q Where did the conversation take place?

A It took place here in New York.

Q Where?

A At the townhouse at 124 East 38th Street.

Q Who was present at that time?

A That meeting, Mr. Ryback, Mr. Deutsch, Mr. Duboff, Frank Austin -- myself, and Mr. Diamond.

Q Would you tell the Court and jury what Mr. Deutsch and Mr. Duboff said to you and what you said to them at that time?

THE COURT: This will be subject to connection as

to Mr. Cohen.

You may proceed.

MR. ROBSON: Could I see that document again? I am confused about something. I can recall the document being date June 27th --

THE WITNESS: This is dated June 26th, sir, you're correct.

MR. ROBSON: I thought the question was did he have a conversation with that document.

THE WITNESS: Yes.

THE COURT: He apparently did, and he did indicate to the Court that it was early June. I had noted that. All right.

You had a conversation in early June with Mr. Duetsch, Mr. Duboff and certain other people whom you have named.

THE WITNESS: The conversation was that this piece of paper was made out to Deutsch and Duboff, which was the billing address that I had at 124 East 38th Street. So that was in early June. At that time Mr. Deutsch, Mr. Duboff, Ryback, all three, asked me to change the billing and to redo billings and proposals to Dimension Management. So I went back and this one is dated June 26th, and this was changed then To Dimension Management. And there was previous

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ones at this time since the billing address had been changed from Deutsch and Duboff to Dimension Management and they asked me to retype them.

Q Did there come a time when you had another conversation with Mr. Deutsch and Mr. Duboff with respect to billing?

A Yes.

Q When did that conversation take place?

A That would be about in July of 1970.

Q Where did it take place?

A Again, at the townhouse.

Q Who was present at that time?

A Mr. Deutsch and Mr. Ryback and myself and Mr. Diamond and Mr. -- I get them all --

Q Please tell the Court and jury what you said at that time and what Mr. Deutsch and Mr. Duboff said at that time.

A At that time it was dealing with these proposals. I then was billing them to Dimension Management but at the same time I had other pieces of paper that would say, instead of entry hall, it would say, Mr. Duboff's office or Mr. Deutsch's office and they got very emphatic and told me to remove their names from all of these pieces of paper and redo them again.

Q Mr. Austin, with respect to the last conversation, you testified about, you referred to certain pieces of paper. What pieces of paper? What were you talking about, in this conversation?

A Well, work sheets, proposals, and purchase orders and invoices.

Q I want to show you whas has been marked as Government's Exhibits 78A through 78D, for identification. Can you identify these documents?

A Yes, I can.

Q What are they?

A Well, they are a combination of documents. They are work sheets with myhandwriting on them, and there are proposals with my handwriting on them. There is proposals that say Deutsch and Duboff, there are proposals that say Dimension Management, and then there are some that are redone, that said New Dimension Securities. Then there is a proposal that -- well, they are totally different. I mean, they are all from the beginning to end, when it said "special lounge-Mr. Duboff's office, " this was retyped, Deutsch and Duboff, Mr. Deutsch's office -- I mean, there is just a series of these.

THE COURT: Describe them. You said they consist of proposals and work sheets?

In the event that motion to strike is denied at that time, the Government may either read or show them to the witness. That is the ruling of the Court.

MR. BLOCK: If your Honor please, I wanted to say something. What I wanted to do at this time, in all seriousness, is to renew the motion for severance which I previously made.

Your Honor recognizes, in the language you used, about the powerful effect of these papers, with which Cohen had absolutely nothing to do. It is so unfair and prejudicial merely because Cohen relied on these men as financial advisors, to saddle him with this, if it is to be believed, and it looks pretty convincing to me on its face, with a couple of scoundrels who were involved in this kind of business, I think it's so unfair and prejudicial -- this is the Government's contention --

THE COURT: You have made your motion for a severance. The motion is denied.

I will give certain instructions to the jury relative to this particular matter.

Q When was the first time that you learned that Mr. Ryback was the principal?

THE COURT: He said about a year and a half ago, is that right?

THE WITNESS: Yes, sir.

THE COURT: You didn't know it before?

THE WITNESS: No, sir.

Q Can you locate that for us in point of time?

A Yes. It was here in New York City when I had to change the billings again to New Dimension Securities, when I was asked to, to destroy all my records and to change everything in my folders, to meet Mr. Ryback and to do all this,a nd it happened in New York City. And at this time I know specifically because Mr. Deutsch gave me a whole bunch of checks for $25,000 made out by his name and he told me that he couldn't sign them anymore but he would pay me, but he had to get Mr. Ryback's signature because he was the one who should sign the checks.

Q You were told that Mr. Ryback was the principal?

A Not the principal. I didn't say that.

THE COURT: Just a moment please. Do counsel want to confer with each other?

MR. ROBSON: I'd like to get one of the files and I asked Mr. Segal to hold it a second.

A In '67 and '68, through June, Investors Diversified Services.

Q Is that referred to as IDS?

A Yes.

Q What type of company was that?

A IDS is a very large investment advisory firm, managing mutual funds.

Q What was your position at IDS at that time?

A I was one of the fund managers.

Q Are you familiar with a company called Richard Packing?

A Yes, I am.

Q Did you have occasion to buy any stock in Richard Packing?

A Yes, I did.

Q How many shares?

MR. SEGAL: May we know when this was, your Honor?

THE COURT: Yes.

Q Approximately when did this happen?

A As well as I remember, 1967, I bought 2,000 shares of the stock at that time.

Q At what price?

A At a price unadjusted for subsequent stock splits,

at 7.

Q Did you receive any additional shares thereafter through stock splits?

A Yes. I received two 25 percent stock dividends and wound up owning 3,225 shares of Richard Packing common.

Q Do you know Bernard Deutsch?

A Yes.

Q Do you see him in the courtroom?

A Yes.

Q Can you point him out, please?

A Yes (indicating).

MR. SEGAL: Conceded.

Q I am going to direct your attention to late 1969.

Did you have occasion to speak to Mr. Deutsch at that time?

A I believe it was either late 1969 or early 1970, yes. I had a telephone conversation.

Q During the course of that telephone conversation, what did you say to Mr. Deutsch and what did he say to you?

MR. SEGAL: Your Honor, may we know who started the call, when it occurred?

THE COURT: Yes.

Q Who placed the telephone call?

A I called Mr. Deutsch.

Q What did you tell him?

MR.BLOCK: This is subject to connection?

THE COURT: Subject to connection as to Mr. Cohen. I will make it subject to connection as to Mr. Duboff as well, at this point.

Q What did you tell Mr. Detusch?

A I told Mr. Deutsch?

THE COURT: Just relate the conversation between Mr. Deutsch and yourself.

A I called Mr. Deutsch and told him I would like to sell my Richard Packing Company common stock.

Q What did he say to you?

A Mr. Deutsch told me he thought I was making a big mistake by selling it. He said he knew where every share of the stock was, how much stock I owned, and he said there was a fund group that were consistent buyers of the stock, in Denver, and that any time the stock dipped or he needed to place stock, he had a place for it in Denver. And he said he thought I was making a big mistake by selling it, and I asked the question, "Bernie, I don't understand how the stock is staying up here with the market so weak."

He said, "Jim, don't worry about it. That stock is going to par."

Q What does "par" mean?

A Par means a hundred, in the parlance of Wall Street. He said not to worry about the stock; it was going to be all right.

Q Did you attempt at any time thereafter to sell Richard Packing stock?

A Yes. I put an order in, I believe, in late spring, 1970. to sell it, but I put a limit on the order.

Q What does that mean?

A I put a price limit on it. I said I wanted to get a price for the stock, so it didn't get sold.

Q What was the price?

A 24, as well as I remember.

Q Were you successful in selling it at 24?

A No.

Q Did you attempt to sell your stock at any time thereafter?

A In the summer of 1970, I called a broker that was listed in the pink sheets as a market maker of the stock --

MR. SEGAL: May we have when in the summer it was, your Honor?

THE COURT: Yes.

Q What is your best recollection as to the approximate month?

A I believe in July, 1970.

Q What happened after you placed this call?

A I called the broker. I don't recall the name of the broker --

MR. SEGAL: Your Honor, I object to any conversation or transaction with a broker --

THE COURT: Yes.

As a result of this telephone call to an unnamed broker, did something happen?

Q Were you able to sell your stock?

A No, I was not.

Q Do you know what the market price of Richard Packing was in the pink sheets in July of 1970 when you attempted to place the order?

MR. SEGAL: Objection, your Honor.

THE COURT: I think the pink sheets themselves would be the best evidence.

Do you have it?

MR. FEFFER: I don't have them, your Honor.

Q Do you know, of your own knowledge, what the price was when you attempted to place the order?

A Around 7 or 8.

Q Were you able to sell your shares at that price?

A No, I was not.

Q Do you still have your Richard Packing stock today?

A Yes.

MR. SEGAL: Objection, your Honor.

THE COURT: He says he does. I will suggest that the inquiry be terminated with that question, at least on that line.

MR. FEFFER: No further questions, your Honor.

THE COURT: We will now proceed to cross-examination.

The record should reflect that in addition to any 3500 material furnished to counsel, the Court was handed up the other day -- and I think you gentlemen observed it -- an envelope which contained an SEC transcript, which, as I recall it now, went back to something like 1967 or 1968, and it involved an SEC investigation of another completely unrelated matter.

I read the transcript. There was no reference whatsoever in the transcript to Richard Packing Company or any of the individuals here on trial, or as to any of the events as to which there has just been testimony on direct

Q Can you explain to us just briefly -- this is background -- as to how you met him, in a personal or a business capacity?

A In a business capacity. Mr. Deane was an institutional salesman for, I believe, Wood, Walker.

Q When was it that you did first meet Mr. Deane?

A In the spring of 1968, I believe.

Q By that time you were an investor in Richard Packing stock?

A Yes.

Q Did you have any discussions with Hugh Deane about Richard Packing?

A Yes.

Q Did Mr. Deane inform you at all that he had spoken to anyone in Financial Programs about the possibility of investing in Richard Packing stock?

A No.

Q Did you ever have any conversation with Hugh Deane about Richard Packing?

A Yes.

Q When was that?

A I think it was in 1968, before I left IDS in June of 1968, and he knew that I owned some stock in the company before I left IDS.

Q Was this in connection with your investment in Richard Packing stock?

A Yes.

Q Did Mr. Deane advise you relative to the condition of the company or anything that was occurring with the company?

A Yes.

Q Can you tell us what he told you?

A He was talking about some of the franchising programs they were getting into and how they planned to expand in the fast-food business.

Q At that time did Mr. Deane give you any advice about purchasing or selling or holding onto your Richard Packing stock?

A Yes.

Q Can you tell us what that advice was?

A Mr. Deane thought it was a very attractive holding and he advised holding it.

Q Did he tell you why he thought it was attractive?

A What I mentioned, the expansion in the fast-food service, the franchising program, and later on some of the operations they were getting into, the dune-buggy company and the marina equipment company.

Q You had subsequent conversations with him beyond

that initial conversation in '68?

A Yes.

Q Can you explain just what that span of conversation you would have with him covered?

Let me make that more clear.

MR. SEGAL: Strike that.

Q Can you tell me how many conversations you had with Mr. Deane subsequent to the first one in 1968?

A I had several.

Q We are talking about conversations relating to Richard Packing.

A Well, Mr. Deane was a salesman that covered our account, both at IDS and Trans-America, so we had conversations about other stocks and Richard Packing.

Q Conversations with regard to your personal investment in it, or with Mr. Deane attempting to interest you as a fund manager in investing?

A Both.

Q Did he continue to indicate to you encouraging statements or advice with regard to Richard Packing?

A Yes.

MR. SEGAL: I have no further questions, your Honor.

THE COURT: Thank you, Mr. Segal.

Mr. Robson.

1968 that Mr. Deane and Mr. Deutsch knew each other, and that Mr. Deutsch knew a lot about Richard Packing.

MR. SEGAL: I am going to object to any conversations which this witness had with Mr. Deane in 1968.

THE COURT: Let me ask you this:

I think your objection is properly taken. When did you learn that Mr. Deane knew Mr. Deutsch? When was that in 1968?

THE WITNESS: In the spring of 1968, as well as I recall.

THE COURT: Do you remember the month?

THE WITNESS: April, May, I believe.

Q In 1969 did you have occasion to speak with Mr. Deane?

A Yes.

Q Approximately how many times?

A Several times. I don't recall the exact number.

Q During any of these conversations did you have conversations with Mr. Deane about Mr. Deutsch?

A Yes.

Q During the course of these conversations, if you can recall one in particular, tell the Court and jury what Mr. Deane said with respect to Mr. Deutsch.

MR. SEGAL: Objection, your Honor. This is not a

part of the information.

THE COURT: Spring of 1969?

MR. FEFFER: During '69, your Honor, yes.

MR. SEGAL: It cannot be construed as part of the information.

THE COURT: The way I construe the information I am going to permit the question to be asked, just as long as it is quite clear that it is in the spring of 1969.

Did you have a conversation at that time with Mr. Deane in which Mr. Deutsch's name came up?

THE WITNESS: Yes.

Q What did Mr. Deane say to you and what did you say to Mr. Deane?

MR. SEGAL: I'm sorry, your Honor. Is the government indicating that this is in any way in furtherance of --

THE COURT: Let's find that out. In furtherance, Mr. Feffer?

MR. FEFFER: Yes.

THE COURT: You represent that it is?

MR. FEFFER: Yes.

MR. SEGAL: Then I would have to plead that it is either surprise or there is a diversion from what the indictment or the information reads.

MR. FEFFER: Your Honor, there were a whole series of questions about Mr. Deane on cross examination.

THE COURT: There were. The objection is overruled. The conversation will be admitted at this time subject to connection as to all three of the defendants.

MR. ROBSON: Will your Honor note my objection, too.

Q What did Mr. Deane say to you?

A Well, he told me about the expansion programs that Richard Packing had, not only in franchising but all the other things they were becoming involved in and what a great job Mr. Cohen and Mr. Deutsch were doing with the company.

Q I am going to direct your attention again to the conversation that you testified to on direct examination I believe in late '69 or early '70. What more did you understand from that?

MR. SEGAL: Objection.

THE COURT: Overruled.

A What I understood was that the stock was -- the stock was pretty well under control by Mr. Deutsch's firm. I would be silly to sell the stock at that price.

MR. FEFFER: No further questions.

MR. SEGAL: Your Honor, I would ask at this point

that he was doing anything wrong, but it could be argued, let's say, by the Government -- and I am talking in that context and in no way trying to reflect on the arguments co-counsel will make on that and I am not trying to bind them in any way.

And, of course, there was this completely separate conspiracy with respect to the activities in connection with the trading in the stock, you know, and I am referring now to the allegation in the information that Naddeo was a co-conspirator, that Masseo was a co-conspirator, that Allessandrini was a co-conspirator, and then we have the business with New Dimension and the whole deal involved with the town house that we heard so much about in the last couple of days.

unless you want to state that the Fund, by buying up the float,was manipulating. Traditionally, I guess, that could be called a manipulation, or, in the market, the classic way of manipulating the stock -- I guess the Rothschilds in the first instance were credited with having learned how to do that.

THE COURT: Fortunately, the Rothschilds and others, including the father of our late President, operated before the Securities Act of 1933 and the Securities Exchange Act of 1934. So I think we are going to have to put the Rothschilds aside for the present discussion.

MR. ROBSON: I recognize that is the classical way of manipulation if that is what the Fund was trying to do, and I have my own suspicions about what they were trying to do, and why. The point is there is no evidence that this was done with any participation by Mr. Deutsch except his own firm was the recipient of the Fund's avarice; they got the brokerage commissions.

THE COURT: Let me take one thing that disturbs me.

I remember testimony by Mr. Hurley that in April or May of 1969, Mr. Deutsch suggested to him that on the buying of the shares by the Funds that, if the shares were

bought from Jafeee, the Funds would get the best price.

Do you remember that?

MR. ROBSON: Yes.

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THE COURT: And my recollection of the subsequent proof as it developed was that, as a matter of fact, there was a built-in profit of which the Funds were unaware in connection with the transactions between, for example, Kelly, Andrews, or Naddeo, and ultimately Loeb, Rhoades for the account of Jaffee.

That, in and of itself, I would suggest, is an item which I must take into account at this time.

MR. ROBSON: Your Honor, in the first place, if in fact that evidence was susceptible of that conclusion, it would merely establish that they had taken advantage of their relationship, but not that they had anything to do with the manipulation.

But I submit to your Honor that the evidence was exactly to the contrary. Mr. Shwidock, Mr. Mazzeo both testified that they attempted to get the best executions; by doing it that way they could buy the stock at the bid prices, rather than at the asked prices, and if Jaffee had gone out to buy the stock we would have had to pay much higher prices. You say that Jaffee was not involved and that this was a side issue --

THE COURT: Let's go on, though.

By doing it his way or their way, Mr. Deutsch and Mr. Duboff were insuring themselves of a commission.

2 elmch

You may say, well, they didn't have any obligation to give up on the commission. But when I heard testimony which I heard on this stand relative to how some of these transactions were handled, I will suggest to you that it was not negligence, it was criminal, what was done here in connection with the buying and selling of these shares as they related to the Funds' buying, Naddeo buying and selling, New Dimension buying and selling, and Loeb, Rhoades for the account of Jaffee buying and selling, everybody getting his point, one-half point, quarter point, eighth of a point, whatever it was, in getting his commission. And it would seem to me that under the circumstances the broker who deals with a customer, and Mr. Deutsch and Mr. Duboff were those brokers who were dealing with the customers, the Denver Funds, and not explaining the situation to the Funds, were breaching their obligation, were in violation of the law, unless they can explain it to this Court and jury in a satisfactory fashion.

I am also predicating my decision here on the state of the record as it exists now. I'm not making it a defensive point because I do believe that there is more which might be introduced when, as and if the defense chooses to do so. I just want you to have my thinking.

were at times discussed. I have no idea what those telephone communications were; neither does your HOnor and neither does the jury.

On this thin thread hangs New Dimension's involvement, all of this prejudicial testimony, and the allegation that New Dimension was somehow involved in a conspiracy to manipulate.

THE COURT: We do have that testimony, you have made reference to it, by Mr. Giasafakis that Mr. Hurley would speak to Mr. Deutsch on various matters approximately four or five times during the course of a day; that as I recall furthere, that he indicated as an example, that Mr. Hurley would receive a telephone call from Mr. Deutsch regarding Richard Packing Company and would thereupon report -- this is my recollection of the Giasafakis testimony -- to the others.

This is very close to the end of his direct examination. The fact of the matter is that the three funds did in fact, in series as we know from the exhibits, purchase Richard Packing Company stock.

Interestingly enough, I have no recollection that they sold any to any extent. There may have been a few modest sales of Richard Packing stock. So it would seem to me if Mr. Deutsch were saying anything about Richard Packing Company and as a result of whatever he may have said the fund bought

and continued to buy in large quantities, the information could not have been adverse to the company. You may say that is an inference I'm not entitled to draw, but I disagree with you on that.

MR. ROBSON: It's an inference that is conceivable. Mr. Deutsch may not have said anything about Richard Packing one way or the other. He had a customer at this point that had millions of dollars invested in Richard Packing. I would expect that he would call fairly frequently to tell them what the market was doing. You could infer all sorts of things about what he said and how accurately what he said was transmitted to Mr. Frankenthaler, but, your Honor, there has to be a limit to which inferences can be used.

We are not talking now about circumstantial evidence, we are talking about inferences. How far can you extend these inferences? Can you now infer that because Mr. Deutsch spoke to somebody, that that somebody was given information which was either a misrepresentation or an omission and that that omission was accurately transmitted to Mr. Frankenthaler and that Mr. Frankenthaler thereby being involved in a conspiracy with Mr. Deutsch, and that Mr. Duboff, who wasn't even speaking to Mr. Hurley thereby becomes involved in a conspiracy?

THE COURT: Let's get the testimony for the moment.

Referring to an answer given at the top of page 2472, which I think is in essence the matter we have been discussing, Mr. Giasafakis is saying:

"We would meet informally after work every night, and myself, Mr. Hurley, Mr. Anton, Mr. Frankenthaler, were known to stay after 4:30, and it would be like a bull session. And Mr. Hurley would receive a telephone call from Mr. Deutsch and Mr. Hurley would tell us what was said in regard to the happenings of Richard Packing, and they were different every time."

An application by Mr. Segal, which resulted in the matter being left in the record. This was at the very end of Giasafakis' direct examination. Take from that the fact that the funds, according to Government's Exhibit 50, were continuously buying, and Mr. Frankenthaler's fund came into the picture and bought, and I think you have sufficient in the record now to refute the point you just made.

That is my view of the evidence as I see it, and as I read the testimony.

MR. ROBSON: In other words, your Honor, Mr. Frankenthaler and Mr. Anton and the people down at New Dimension were all involved in the conspiracy at that point in time with respect to Mr. Anton's and Mr. Frankenthaler's purchase on the basis of this one sentence?

THE COURT: No, I didn't say that.

MR. ROBSON: But that is the only involvement of Mr. Frankenthaler. If Mr. Frankenthaler was not a part of the conspiracy, although he is not named --

THE COURT: He is not named, that's correct.

MR. ROBSON: Then I don't know where the manipulation occurs through New Dimension. Mr. Hurley is named as a co-conspirator, but where does Mr. Anton and Mr. Frankenthaler get into the manipulation?

THE COURT: He was being manipulated. You jump to the conclusion that from all this I say Mr. Frankenthaler was a conspirator, actively rigging the market, manipulating the market, whatever, and I say to you the evidence, as it appears at this point, is, conspirator Deutsch was relaying information to conspirator Hurley who then is telling things to the Messrs. Anton and Frankenthaler. As a result of what they are told, relative to Richard Packing, we have purchases by their two funds of Richard Packing stock in substantial amounts and I say that basically this was the way in which the conspiracy which involved Mr. Deutsch and Mr. Hurley was being executed.

They were using the other men to carry out the conspiracy. Now, we differ on this, but that is the Court's view at this stage. Would you proceed?

*****

A Yes, I was.

Q From when to when?

A From approximately October of 1968 to September of 1970.

Q Mrs. Segal, what was your position with Richard Packing Company?

A Secretary-receptionist.

Q For whom were you a secretary?

A Mr. Milton Cohen.

Q I show you Government's Exhibit 13-A and ask you if you recognize this document.

A This was the annual report that we sent out to the stockholders.

Q Let's talk about sending it out.

I direct your attention to sometime in the spring of 1970. Did you see a number of documents like that at that time?

A Yes.

Q What happened with respect to [illegible] just tell us briefly?

A When the documents came into the office?

Q Yes. How did they come in? Did they come in in bulk?

A Yes.

Q Do you recall whom they came from?

A No, I don't.

Q Had you been given any instructions with respect to the possible arrival of those documents?

A Once they got into the office, they were to be mailed out directly.

Q When these documents came in in bulk, what, if anything, did you do with those documents?

A I started to put the stickers on the envelopes and mail them out.

Q You mentioned the stickers. What were the stickers?

A It was a large package that had all the names of the people that were waiting for these, and they were gummed and taken off and put right on the envelope.

Q Were these the names of stockholders?

A Yes.

Q Where had those stickers come from, do you recall?

A From the Northwestern Bank.

Q Do you know whether or not that Northwestern Bank was the transfer agent?

A Yes, they were.

Q They were the transfer agent for Richard Packing Company stock, is that correct?

A Right.

Q In addition to mailing these out with the stickers, did you mail them out to any other lists?

A Yes, I had my own list from people who had called and requested the report.

Q Did anybody else work on this mailing?

A Yes, there was Mr. Cohen's son and his brother.

Q What is his son's name?

A Mark.

Q What is his brother's name?

A Harvey.

Q Was any other work done in the office on the day that these things came in, outside of attending to the mailing of them?

A No, sir.

Q You mean everything stopped?

A That's right.

Q How soon after they came in did they go out?

A Oh, it must have taken us the good part of the day, but they went out.

Q They went out the same day they came in?

A That's right.

MR. BLOCK: May this be marked.

(Defendant Cohen's Exhibits NN and OO were marked

(Government's Exhibit No. 89 was marked for identification.)

Q Mrs. Segal, I'd like to show what has been marked as Government's Exhibit 89 for identification and have you look at it and see whether they may help you to recall the date when you sent out the 1969 annual report.

A You want me to recall this date, [illegible]

THE COURT: No. Does that refresh your recollection, looking at that piece of paper; does that refresh your recollection as to the specific or approximate date on which you sent out the 1969 annual report?

A No, it doesn't.

Q Is this the type of envelope that was used to send out the annual reports?

A Not this. This is not familiar to me.

Q Have you ever seen an envelope [illegible]?

A Not to my recollection. They all had the Circus Wagon.

Q The Richard Packing ones did?

A Yes.

Q I will ask you to look at the label on the front. Is that the type of label that you were referring to before?

A Yes, it is.

Q Isn't there a Circus Wagon on this envelope, Mrs.

Segal?

A Yes, there is, on the stamp.

Q On the stamp, correct?

A Yes.

Q You are quite certain that you have never seen, during the two years that you were with [illegible], an envelope resembling this envelope; is that correct?

A Yes.

Q Mrs. Segal, in your position as secretary, were you familiar with the employees of Richard Packing Company?

A Yes.

Q Were you familiar with the people who were associated with that company?

A Not all of them.

Q Do you know of a Harry Morgintin?

A No.

MR. SEGAL: Your Honor, I am going to object to this.

THE COURT: She has answered the question "no."

Q Do you know of a William Harris?

MR. SEGAL: Objection.

THE COURT: Overruled.

MR. SEGAL: Your Honor, this is beyond the scope

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A I work for the Conquistador Basketball team of the ABA as in charge of public relations and sales, as well as I am Wilt Chamberlain's manager.

Q Are you his personal manager?

A And business manager. There are two ends to it.

Q Wilt Chamberlain is a leading basketball player, is that correct?

A Yes.

MR. BLOCK: I think the jury can take judicial notice of that.

Q How long have you been engaged in these two activities that you have told us about, with the basketball team and Wilt Chamberlain?

A About two years.

Q Did you have a college education, sir?

A Yes. I graduated from San Jose State.

Q Did you get a degree?

A Yes, B.S., in business.

Q A B.S. in business administration, is that right?

A Yes.

Q Did you have any other training?

A I had a degree in international correspondence school from Stranton, Pennsylvania, in marketing.

Q Any other training?

THE WITNESS: Three years.

Q Had you had any experience in the franchise field before you went with Diners Fugazy?

A Yes, we franchised some real estate offices. This was moreor less the beginning of franchising.

Q Before you went with Status Marketing, for a number of years, how many years had you been involved in the franchise field?

A I'd say in the neighborhood of six or seven years.

Q Directing your attention now to the sale of Richard Packing Company franchises when you were with Status Marketing, what was involved in the sale of franchises? Could you describe it briefly?

A We would go over all the benefits of a franchise, owning an opportunity, a business venture for yourself, and after that was completed, we then would get a financial statement from the individual, as well as personal references that we would check on. He then would give us either a deposit or a check for the franchise. We then would wait a period of time to find out if his credit application was approved, and we then would look for it after it was approved, we would ship everything off to Richard Packing Company and we'd look for a location, because everything started with the finding of a location for the particular restaurant venture.

transaction. And I used to have sort of a set plan that if the man was financially capable of having more than one franchise over a period of time, I would try to entice him on the fifth franchise, from one to five, that he did not have to pay a franchise fee at that particular time that it became mature.

Q So in other words --

A But there was no set --

Q -- the franchisee, is this a fair statement, was really a matter of negotiation?

A Yes, basically.

Q Where it involved more than one unit?

A Right.

Q In connection with the sale of franchises, did you make reports on any kind of a regular basis, and if so -- well, answer that question.

A Yes, I made regular reports. I would make a regular report about every two weeks and they would go to my superior and I would send a copy off to Richard Packing. And then monthly, I would do an overall to try to keep everybody abreast of what was going on.

Q In connection with those reports, when you say that you would send a report to Richard Packing Company, where, to what office of Richard Packing Company would your reports go?

A Well, prior to Mr. Kally being president, we used to send most of the stuff to Minneapolis. But then when Mr. Kally came, he headquartered out in Los Angeles, so I would send duplicate copies, one to Richard Hacking in St. Paul and one copy out to Los Angeles for Joe Kally's perusal.

Q Do you have any copies of any of these reports in your possession at the present time?

A I imagine I have some around. You're asking me a question that is hard to answer. Yes, I do have some reports that were just like in my files, but most of my files were left intact at Status Marketing.

Q They were left intact at Status

A Yes. And I understand that they were sent but eventually to Los Angeles, to Joe Kally. But I have no recollection where all the files are.

Q Did you make oral reports about the sale of franchises?

A Yes, there were oral reports that were made to both Joe Kally and to Milton Cohen, at certain times.

Q How wouldthis business of making oral reports to Mr. Cohen come about?

A Mr. Cohen would call us periodically and I felt that I was an aggressive leader of men, and I was constantly on my people's backs to be able to produce more franchise sales,

because that was the name of the game.

Milton Cohen and Joe Kally were constantly calling saying, "Well, how many did you sell today, how many will you sell tomorrow, what do you expect to sell?" These basically were the oral reports that I made; we sold three today or we'll sell five next week, etc.

Q In making those reports that you just described, did you -- let's just say, for example, that you told Mr. Cohen, we sold three today or three yesterday; did that mean, when you were telling it to him, that you had signed contracts and money was in the bank at the time you told him that you had three franchises sold?

A Not necessarily. Basically, when I made my monthly report, when I really got down to specifics, because I also had to rely upon my field, and I constantly, every morning, I'd make my start from one end of the country all the way to the coast, I'd call and ask progress preorts on what happened to any particular customer, and I'd get a rqort from my salesman saying we sold Anaheim or Tuscon or whatever it might be. And I would go on that information. But I wouldn't receive the contract sometimes for possibly two or three weeks.

Q Did it ever happen that you got a rqort that a franchise had been sold when actually it was just an

Q I show you PP for identification and ask you if you would look at this and see if this refreshes your recollection as to the number of franchises that had been sold as of October of '69?

THE COURT: What number exhibit was handed to the witness?

MR. BLOCK: PP, your Honor.

A I recall most of these names.

Q Can you give us a figure?

A I would say it was in the neighborhood of 100.

Q That had been sold up to October of 1969?

A There are some down here that I know were cancelled, 1,2, 3, or so, that were cancelled.

Q There were three that were cancelled?

A That I recall.

MR. FEFFER: Your Honor, I would ask that this document be offered, as being read from.

THE COURT: You can do that at some future time, if counsel chooses not to.

MR. BLOCK: I have no objection to putting it in evidence. The government suggests it and now they are starting to qualify -- I withdraw the offer.

THE COURT: I would suggest that we leave it at that.

Q You said that some contracts on there had been cancelled. How many units were involved in each of the contracts that were cancelled?

A Most of the ones that were always cancelled were single units.

Q I'm talking about the three you saw on that particular list.

A You asked how many, and there were three.

Q Do you have a recollection of when they were cancelled?

A Probably around thirty days after the time they had signed them, maybe a little longer, but not much more than that.

Q When these contracts were cancelled, was that the fault of the Richard Packing Company or the fault of the franchisee?

MR. FEFFER: Objection.

THE COURT: Sustained.

Q Whose fault was it?

MR. FEFFER: Objection.

THE COURT: Sustained.

Q How did it come -- were these three contracts that you say you now recall were cancelled, when would you say it was, before October of 1969?

Q Were all these contracts cancelled for the same reason?

A Yes.

Q What was the reason?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

MR. BLOCK: Is that sustained as to form, your Honor?

THE COURT: I would suggest relevance and materiality. What is your objection, Mr. Feffer?

MR. FEFFER: That's it, your Honor.

MR. BLOCK: There was an issue raised in this case with respect to that in connection with the testimony of Mr. Kally, your Honor, and I think I have a right to it.

THE COURT: I adhere to my ruling.

Q If you eliminate those three, how many now do you recall -- how many franchises had been sold as of October, 1969?

A I would say around 90, 95.

Q Now, --

MR. FEFFER: Your Honor, was that answer given from a reading of the document?

THE WITNESS: No, it wasn't. The document says more.

THE COURT: But your recollection, independent of the document, is about 90 to 95?

THE WITNESS: Right.

Q When you would sell a franchise that involved more than one unit, didyou have a way of counting that in connection with the reports you made?

A When we sold franchises, our inventory, our product, we classified as territory, real estate, and consequently if we went into a particular area and there were so many franchises we felt could be sold and we tied up a territory, such as Wagon Masters of Ohio, that was the whole state of Ohio, and we could classify them down to an opening time period of when the franchises had to materialize, and we considered the whole state to be gone.

When it was 50, 75 or whatever would facilitate in that territory, consequently our territory was depleted and we could no longer sell in Ohio. So I considered it to be gone.

THE COURT: In other words, you considered territory to be inventory?

THE WITNESS: Correct.

THE COURT: And once you sold the territory, that was out of inventory?

THE WITNESS: Yes. There were two ways, your Honor. There was one who was an individual person you knew

could only afford one franchise. That was basically a one-franchise deal. You were going to give him all the assistance you would give the 50, but you were really looking for an investor with a group of men that had the capital to build a chain within a chain. We looked more for him than the ones and twos.

Q When, for example, you sold a franchise for an entire state, such as you talked about in connection with Ohio, how would you count the number of franchises sold?

A We would count on a contractual basis and it would get back down to where the fifth one would get the franchise out a franchise fee, and I tried to make them in multiples of five, and then we would find out geographical population-wise how much we thought the territory would hold up for. You couldn't put in a franchise if you had only 5,000 people living in a small town, but if you got into Youngstown, Ohio, with a population of 100,000, it might support three, or you could go by definition of counties.

Q I'm not clear as to how you counted, for example, the state of Ohio. Did you count it on the basis of potential?

A Yes. We had a pretty good rule of thumb. If a town had say, five McDonald's in it, we felt it could support two Circus Wagons comfortably.

Q This counting was done irrespective of what the

particular contract provided?

A We would always put a stipulation in on the boundary lines of what it would encompass. In other words, if you were going to buy Hawaii--

Q Stick to Ohio.

A If you wanted Youngstown, there might be territories he wanted to go into, Canton, Dayton, take the whole state. If he took the whole state, we would outline how many he had to open over a period of time. We would hope he opened more, but the minimum was what we showed. We would hope that he opened a hundred.

Q Did the contract specify the number of units he was bound to open?

A Yes.

Q And you counted that full potential in reporting to Mr. Cohen and Mr. Kally as to the number of franchises sold?

MR. FEFFER: Objection.

THE COURT: Sustained.

Q Did you make that calculation when you were reporting to Mr. Cohen?

MR. FEFFER: Objection, your Honor. What calculation?

THE COURT: Sustained. I don't understand the question. If the witness does, I will let him answer it.

A We signed contracts for the amount of territory and franchises for the amount received in the contract of -- if it said 20 in the contract, that is what he signed. If it said 5, that is how many he was committing himself to.

Q Is that the way you would report?

A Yes, the total amount of the expectation of what we considered to be the contract. It was important to us because it was like an insurance policy, annuities, as they come along.

Q Did you ever report a franchise sold where the contract had not been closed?

MR. FEFFER: Objection, your Honor, leading.

THE COURT: Yes, it is leading.

Q When you made your reports, and I'm talking about the reports to Mr. Cohen, what did you tell him about when you were telling that franchises had been sold? Do you follow me?

A I don't recall verbatim what I put down.

Q I'm not asking for anything verbatim. I'm talking about with respect to whether the contract had actually been signed and there was money in the bank, did you treat that as a sale?

A Yes.

Q Did you treat it as a sale when there was just a handshake?

MR. FEFFER: Objection to the leading, your Honor.

THE COURT: Sustained.

Q How would you treat a mere handshake?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q Were there occasions when you shook hands on a deal?

MR. FEFFER: Same objection.

THE COURT: Sustained.

Q At what stage in the negotiations would you report that there was a sale, and I am talking about reporting to Mr. Cohen? Do you understand the question?

A Yes. I am trying to remember four years ago.

MR. FEFFER: Your Honor, may I ask whether it is the witness who is actually telling Mr. Cohen or reporting, or is it somebody else?

THE COURT: Did you report sales directly to Mr. Cohen?

THE WITNESS: Yes, I reported the sales. It was my responsibility to tell Mr. Cohen what had transpired in the period of time.

THE COURT: At what point in time did you report to Mr. Cohen that a sale had been made?

Q At what point in the negotiations?

A Why it is hard to answer the question is that there was no particular format. Sometimes you would get a contract and a postdated check and if sales were slack that month, you would put that one in to appease him. Sometimes we would get a whole bunch and not tell them about them until the checks matured. There was no format on when you would say this is a particular concrete sale. It depended upon how hard they yelled, sometimes.

Q How hard you mean Mr. Cohen yelled for information? Is that what you're saying?

A Yes.

Q Was there an element of exaggeration at any time in any of your reports --

A No.

MR. FEFFER: Objection.

THE COURT: Sustained.

The jury will disregard the answer as well. Strike it.

MR. BLOCK: Would you mark this, please.

(Defendant Cohen's Exhibit QQ, marked for identification.)

Q Do you have any recollection, sir, about how many franchises had been sold as of February of 1970, as you sit

there?

A It would only be a guess.

THE COURT: You have no recollection?

THE WITNESS: I don't recall right now.

Q You really have no recollection?

A No.

Q Do you have any recollection as to how many had been sold as of March of 1970, as you sit there?

A I would say around approximately 180.

Q But in connection with what had been sold in February, you don't have any particular recollection. I show you QQ, and ask you to look at this and see if this refreshes your recollection as to the number sold in February.

THE COURT: Does it?

THE WITNESS: Yes.

THE COURT: Your recollection having been refreshed by QQ, approximately how many had you sold as of February, 1970?

THE WITNESS: About 182.

THE COURT: So you sold 182 as of February, 1970 and approximately 180 as of March, 1970.

THE WITNESS: I'm sorry, your Honor, I misconstrued that. I was taking it all the way up toMarch. These are dated all the way to March.

THE COURT: You were asked as of February, is that right, Mr. Block?

MR. BLOCK: Yes.

THE COURT: How many as of February, if you can tell us?

THE WITNESS: It looks like 140, 130.

Q Did you have any negotiations with respect to the sale of a number of franchises in New York State? Do you recall anything about that?

A We were under negotiations, in fact, with a very large corporation, with a substantial financial statement, and they had food concessions in a lot of the ballparks and race tracks --

Q What was the name of the corporation?

A I can't recall, Jericho or Jebco --

Q I will have this marked and show it to you.

(Defendant Cohen's Exhibit RR, marked for identification.)

Q Did you ever see RR before?

A Yes.

Q Did you see that in the course of your duties?

A Yes. I requested it, as I requested --

Q Does that refresh your recollection as to the name of the company involved?

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Q I beg your pardon?

A About $50,000,000 a year in sales.

Q And about 25,000 employees?

A Something like that.

Q When were you engaged in negotiations with this outfit? About when?

A About March.

Q Of what year?

A 1970.

Q March of 1970.

Did this involve the entire State of New York?

A Yes, I think it was New York and I think there was another state involved as well.

Q Did you ever make a report to Mr. Cohen about the progress of the negotiations in the Jacobs matter?

A Yes, I did.

Q What did you tell him?

A At the time we thought we had it pretty well sewed up. We thought we had a signed contract coming momentarily.

Q About forty franchises, you say?

A Correct.

MR. FEFFER: Your Honor, can I have which time? Would that be in March of 1970?

THE COURT: When did you indicate that to Mr. Cohen, that you thought you had it sewed up or you thought you had a signed contract?

THE WITNESS: Beginning of March.

THE COURT: of 19- --

THE WITNESS: Of 1970. This particular customer was a personal friend of another franchisee that we had already sold, that owned a race track, and they were going to joint venture all their states together, and it was quite a multi-deal and we had already signed the one franchisee up to a multi-contract. That was Durbin, Pocono Downs.

Q When contracts were cancelled, and we talked about some contracts being cancelled, was the money paid under the contracts refundable?

A Not by the contract. The contracts were non-refundable deposits.

Q What was Mr. Cohen's practice, if he had a practice, with respect to those nonrefundable deposits, when contracts were cancelled?

MR. PEFFER: Objection to the form of the question, your Honor.

THE COURT: Sustained.

Did he have a practice?

THE WITNESS: Yes.

THE COURT: You are saying as of February 3, 1970 you thought you had about eighty franchises sold?

THE WITNESS: Right.

Q Now we come --

A Maybe this is the wrong time to bring it up --

THE COURT: Don't volunteer.

MR. FEFFER: I have no objection, your Honor.

THE COURT: Well, I do.

Let's get on with it.

Q Do you want to clarify something we have been talking about?

A I was responsible for the franchises that were sold in the United States, and there were other franchises that were sold in other parts of the country that I didn't have any part in or knowledge of that happened prior to my coming to Status Marketing, and there was a deal in Canada that I don't know anything about.

I understand there were franchises sold in Canada. A lot of times I never knew the exact figure; it could have been ten, it could have been a hundred, for all I knew.

Q Were you confined to the continental United States?

A Yes.

Q Did you take in Hawaii and Puerto Rico?

A I took in Hawaii, but not Puerto Rico.

We always anticipated when we saw figures that Canada was always part of the figures.

Q But you are not informed about Canada?

A No.

Q What I am driving at now is, on the basis of your own knowledge about the territories that were in charge of, and we will talk about that figure of sixty as of February 3rd, can you say whether that is an understatement or an overstatement, on the basis of your personal knowledge?

A I would say that was an understatement.

Q How about the next figure, which is as of February 19th, where the letter says, "We had sold one hundred franchises" --

MR. FEFFER: Your Honor, may I look at some of the documents that have been given to the witness?

THE COURT: I thought it was Government's Exhibit 4 in evidence.

MR. FEFFER: I wanted to look at the other ones, not those, your Honor, so I could be preparing for them.

THE COURT: All right.

MR. BLOCK: Unless the witness needs them to refresh his recollection.

THE COURT: If he does, he will ask for them.

Q As of February 19th Mr. Cohen stated "we have sold one hundred franchises."

On the basis of your personal recollection, would you say that that was an understatement or an overstatement?

A I would say that was about correct.

Q About correct?

A Yes.

Q And then that sentence, "As of March 4th, we had gone to two hundred franchises."

Do you see that?

A Yes, I do.

I would say that was an overstatement.

Q I beg your pardon?

THE COURT: You said that was an overstatement?

THE WITNESS: Two hundred, I think would be an overstatement, not counting Canada.

Q But to what extent?

A Twenty.

Q Let me ask you this: With respect to the deal for New York State involving the forty franchises --

A That would be way over if we had them.

Q Did you report to Mr. Cohen that that deal was closed?

MR. FEFFER: Objection to the leading, your Honor.

THE COURT: Sustained.

Q Did you make any report to Mr. Cohen around the beginning of March with respect to the deal with that Sports Service Corporation involving the forty franchises in New York?

A Yes, we reported it.

Q And how did you report it?

A Reported that we had it in the ~~bank~~ bag, that it was sold.

Q That it was sold?

A We thought it was sold; there was great enthusiasm on my part.

Q I am asking you what you reported. You said you reported that it was sold?

A We reported that it was sold.

Q If those forty franchises were counted along with the 180 that you talked about before, that would be in excess of the two hundred mentioned in the letter; is that correct?

A That's correct.

Q That doesn't count Puerto Rico, does it? Your figures that you are giving us now does not count Puerto Rico, and it doesn't take Canada into account, either; is that right?

A Correct.

Q Who was the source of the information about the number of franchises sold as far as Mr. Cohen was concerned? Was it you or somebody else?

A Well, I imagine it would be both of us. It would be either myself -- he knew I didn't have anything to

that time?

A Yes, we opened offices in Chicago and Dallas and in Miami.

Q Five different offices?

A Yes. The two offices, the one in Miami and the one in Dallas, were already established, but the salesmen were no longer with the company.

I mean the physical offices were there, but there were no men.

Q How many clients did Status Marketing have when you arrived in the fall of 1968? How many different franchise programs were they involved in?

MR. BLOCK: I object to that, if your Honor please. What difference does that make?

THE COURT: I can going to permit that inquiry.

A There was Circus Wagon and that was basically the only franchise that we were selling. There were other franchises that were on the table, but they had not been cleared for sales as of yet.

Q Would it be accurate to say, then, that you and Mr. Ward and the fellow in Los Angeles, Mr. Mondrow, were spending all your time selling Circus Wagon franchises?

A Mr. Mondrow wasn't selling in Los Angeles.

Q Forget about him.

The other people I mentioned.

A Yes, there was Jim Majors in Chicago, Joe Florontio in Dallas --

Q This is in 1968 now, the fall, when you first got there?

A No. When I first got there Florontio was there. He was selling. And two other gentlemen in New York.

Q How many franchises had been sold when you arrived?

A I was under the understanding that Puerto Rico was sold, Canada was sold -- and I can't remember how many other ones.

Q Were those sold by Status Marketing?

A Yes, they were sold by Bill Ward, to my recollection. I think the franchise in Anaheim was sold, too, before I started.

Q I'd like to read you a statement from Government's Exhibit 2, that reads as follows:

"The company also had a large number of units sold before its initial advertising began, of which Jaffee & Company sold a significant portion."

A Who?

Q Jaffee & Company.

Did you ever hear of Jaffee & Company?

A I don't recall it.

MR. FEFFER: This is Exhibit 2. It's from Mr. O'Meara to Mr. Bernhard.

Q You never heard of Jaffee & Company?

A I didn't say that. I can't recall.

Q "The company now expects to have at least 150 units operating by the end of the year."

How many units did you have operating by the end of 1969? Operating.

A I think four.

Q Were there construction problems in 1969?

A The latter part we were having trouble getting locations.

Q How about the first part of 1969? Construction problems.

A Not to my recollection.

Q How about the middle part of 1969? Construction problems.

A It's hard to answer a question like that because there were different problems with every location.

Q Fine.

Did you encounter construction problems or other problems during the middle part of the year 1969?

A Yes, we did.

Q What were they?

A They were problems depending on what the location was. We had problems in some locations of drainage in the New York area --

Q In New York, didn't you testify --

MR. SEGAL: Objection, your Honor. The witness didn't finish.

Q I'm sorry. Finish your answer.

A I forgot your question.

Q I want you to limit your answer to 1969.

A In '69 we had problems with locations.

Q In New York?

A In Florida, we had some problems on a wall, if I remember correctly, that had to be built before the things could settle down.

Q You mention you had problems in New York. What type of problems did you have in New York in 1969?

A We had a problem in one of the surrounding areas, that we had --

Q No. New York, I am talking about.

THE COURT: New York State?

Q That is what I am saying, New York State.

THE COURT: He said surrounding areas.

Q Of New York City, are you referring to?

A I don't recall. I would consider it to be New

York. It could be in Queens, for all I remember, but we had a problem with a land thing.

Q Didn't you testify that negotiations were under way in New York in March of 1970, for New York State?

A Yes.

Q What was happening prior to March of 1970 in New York?

A We had a franchise that was sold out in the suburbs to a gentleman, his name was Stevenson or something like that; Stevens.

Q What happened to that franchise?

A He eventually opened up.

Q When was that?

A It was in '69.

Q That would be one of the four franchises that were open in 1969?

A I think he was one of them, yes.

Q How many franchises were opened as of March 1970?

A (No response.)

Q By "open" --

A To my recollection, there were around nine or ten, eight or nine.

Q Did you communicate the problems which you

described -- I think you referred to a problem in Florida and a problem in the surrounding area of the City, and I apologize for putting you off there -- did you communicate these problems to other people?

A Yes.

Q Did you tell Mr. Cohen of the problems that you were having?

A Yes, I told Mr. Cohen that we were having problems with real estate in certain areas.

Q Did you communicate these problems to Mr. Cohen on a regular basis?

A It was in my reports monthly if we were having problems with locations.

Q Can you enumerate the types of problems which you say you were having in the program, in the franchising program, in 1969, early 1970?

MR. BLOCK: Your Honor, I object. This man is a salesman --

Q If you know.

MR. BLOCK: I don't think this is relevant. He wasn't concerned with construction problems.

THE COURT: If he knows, I will have him answer. If he doesn't know, I can understand his not knowing.

MR. FEFFER: Your Honor, I'm not limiting this to

construction problems.

Q I am talking about any problems which you encountered which prevented you from reaching the 150 number, for example, of units; any type of problems you encountered.

Can you just enumerate the ones you can recall?

A We had problems finding suitable locations to put restaurants in.

Q Any other?

A The price of construction had gone up considerably and we were looking for new suppliers in certain areas.

Q Any others?

A That is about it.

Q And you communicated this to Mr. Cohen, is that correct?

A It was Richard Packing Company's concern, as well as it was ours.

Q But you discussed it with Mr. Cohen?

A We didn't have to because it was part of the industry. Everybody was having the same problem.

Q I refer to Cohen's Exhibit W, March 16, 1970, I believe that this was --"the company's only problem is its accounting which is plaguing the franchising industry."

Is that a correct statement, the only problem --

MR. BLOCK: That was Mr. Cohen's letter.

MR. FEFFER: It wasn't his letter.

THE COURT: It was read by you, Mr. Block, to my recollection, and it is in evidence.

A Would you repeat the question?

THE COURT: Do you withdraw the objection?

MR. SEGAL: No.

THE COURT: Overruled.

Q Was the company's only problem then, as of March 14, 1970, it's accounting, or were there other problems, as far as you know, the franchising?

A I wasn't involved in that part of it.

Q But were there other problems besides the accounting?

A It could have rained one day and a site was all full of water, how far do you want me to go back as far as problems?

Q I'm talking about day to day problems that you encountered in the franchising business, with Richard Packing.

A There were problems finding suitable locations at times.

Q How many locations did you haveopen in March of 1970?

A About nine.

Q That's right. So I take it Status Marketing as of February and March was making quite a bit of money, with all the sales of these contracts, is that correct?

A Not necessarily.

Q Wasn't a lot of money coming in on all these contracts there were being sold?

A Yes.

Q So they were doing fairly well as of February, March of 1970, isn't that correct, Status Marketing was?

A I was not responsible for getting the money that we received from the franchisee. The accounting and everything was not my department.

Q You testified that Status Marketing went bankrupt or went out of business when?

MR. BLOCK: He said it demised.

Q Demised.

A In --

Q End of 1970?

A '70.

Q End of 1970 you said, is that right? Are you sure it wasn't earlier?

A I can't recall the day.

Q I'd like to have you look at Mr. Cohen's EE-1 and ask you to look at the first, second and third paragraphs,

"The meeting was called basically because of the concern on the part of the franchisees with the demise of Status Marketing and Status Realty and their general concern for the growth of Circus Wagon."

THE COURT: If counsel want to read any other portion of that letter, they may.

MR. SEGAL: Not at this time, your Honor.

Q Are you familiar with the New York office of Status Marketing? Or were you at that time?

A Yes.

Q Were you working in that office?

A Yes, I was.

Q Were you working in that office in April of 1970?

A I don't recall if I was in New York or back in Los Angeles. I spent a lot of time at the end there in Los Angeles.

Q Didn't there come a time when Mr. Ward left Status Marketing?

A Left Status Marketing?

Q Left, resigned.

A Not while I was there.

Q Are you sure about that?

A To my recollection.

Q You're sure that Mr. Ward didn't leave on April 15,

Q I would like to show you 92 for identification and ask you to look at it and identify it, Mr. Faris, if you can.

A It's a copy of a contract from Circus Wagon Division of Richard Packing Company, license agreement made out for Fun Foods, Inc.

Q I believe you --

A This is not mine.

Q Have you seen this contract before, the original contract before?

I believe Mr. Cohen's signature appears on the contract on behalf of Richard Packing. That would be Milton Cohen, is that correct?

A Yes.

MR. FEFFER: Your Honor, the Government would offer 92.

MR. BLOCK: No objection, your Honor.

THE COURT: Mr. Segal and Mr. Robson?

(Pause.)

MR. ROBSON: No objection.

MR. SEGAL: I have no objection, your Honor.

THE COURT: Received.

(Government's Exhibit No. 92 for identification was received in evidence.)

Q Mr. Faris, there is reference to an FFI in this contract. Would that be Fun Foods, Inc., to the best of your recollection?

A I don't recall.

Q I want you to look at the agreement.

(Pause.)

A Yes.

Q Was Fun Foods the name of the franchisee that had the Circus Wagon contract for the State of Pennsylvania at that time?

A Correct.

Q I am going to read you a couple of sentences from the addendum. I am reading from Paragraph 1.

It says, "FFI, in consideration of this grant, has paid to the Richard Packing Company the sum of $50,000 in cash and its note in the amount of $150,000 due on May 15, 1970. Upon collection, this note shall pay the balance owed for ten franchises in the exclusive area."

Up until that point, is not this contract at least in part for ten franchises?

MR. BLOCK: I am going to object to that, if your Honor please. The document speaks for itself.

THE COURT: I think it does, too, frankly. We

hears what the price was.

Sustained.

Q The contract or the addendum goes on:

"When construction commences on the tenth unit the corporation shall pay the Richard Packing Company $200,000 as full payment for franchises on 11 through 20."

Did construction ever commence on the tenth unit?

A No.

Q How many units were constructed in Pennsylvania?

MR. BLOCK: If he knows.

Q If you know, approximately.

A I thought --

MR. BLOCK: I am going to object to that, your Honor, as being immaterial to the issues in this case.

THE COURT: Overruled.

If he knows, he can answer.

A I don't know.

Q Do you have any recollection at all? I believe you said there were nine, total. How many were in Pennsylvania?

A I don't recall if they were in Pennsylvania.

Q I believe you testified that you had sold Fun

Foods for the State of Pennsylvania, or Fun Foods, thirty, forty, fifty contracts; is that correct?

A Yes. Thirty or forty.

Q Isn't it a fact that from ten on, it was contingent on certain things?

MR. BLOCK: I am going to object to that. The contract speaks for itself. That is the same subject.

THE COURT: Yes. The contract speaks for itself and the contract is in evidence. I think the question is improper.

MR. FEFFER: Your Honor, my point is --

MR. BLOCK: I object to his stating what his point is, your Honor.

MR. FEFFER: -- the witness has testified that a certain number of contracts were sold --

MR. ROBSON: Your Honor, I object to statements by Mr. Feffer.

THE COURT: Ask your next question, Mr. Feffer.

Q Mr. Faris, you testified that Status Marketing sold somewhere in the neighborhood of forty franchise units in the State of Pennsylvania; is that correct?

A Correct.

Q In that area?

A In that area. Thirty; forty.

Q Isn't it a fact that anything beyond ten units was contingent on certain things happening in the future?

MR. BLOCK: Objection.

THE COURT: Overruled.

If you know.

A I don't understand what you mean, "contingent." Upon what?

THE COURT: Ask your next question. He doesn't understand the question.

Q Mr. Faris, isn't it a fact that before Fun Foods would add any units above ten -- in other words, ten through forty or ten through thirty -- that certain things had to happen?

MR. ROBSON: If your Honor please, there is a contract in evidence.

THE COURT: Doesn't the contract specify this? You can read the contract to the jury. You can show it to the jury. You can do anything you want with the contract.

But I think to ask the witness to interpret it, unless there is some ambiguity there, that is improper.

MR. FEFFER: I am asking for what he means by thirty or forty contracts sold, not for him to interpret it.

A Means when a piece of geographical real estate has been taken off the books, that I can no longer sell a franchise in a particular area, and it was committed to purchase, as to how many units an individual was going to purchase.

Q Well, take a look at Mr. Cristina's contract. That is in evidence. You used the word "committed," how much a person was committed to.

How many contract units or units of Circus Wagon Restaurants was Mr. Cristina committed to?

A I don't know.

Q I'd like you to look at QQ, Mr. Faris.

A How about the contract?

Q I will show you that. I'd like you to look at QQ first.

A It says twenty.

Q I am going to read from the addendum and what has been marked as Government's Exhibit 13-B-1.

"The license to adopt and use a Circus Wagon Restaurant provided for in Paragraph 2 shall apply to a total of two establishments."

The next addendum -- I am reading from the addendum of Mr. Cristina's contract.

THE COURT: What exhibit?

MR. FEFFER: 13-B-1 in evidence.

MR. BLOCK: What is the date of the addendum?

MR. FEFFER: '69. Looks like --

MR. BLOCK: It's 11.

MR. FEFFER: 11/17/69.

THE COURT: You said you are reading from 13-B-1. I have that as being Mr. Brodcorb's workpapers.

MR. FEFFER: And it's included in that, your Honor, the contract.

THE COURT: It's part of it. All right.

Q Exhibit B to that same contract says, "It is understood by Mr. Jack Cristina that Cristina franchise for Circus Wagon has been granted the following option. After ninety days of operation of his first Circus Wagon opening, Mr. Jack Cristina may elect the following plan."

Was there an opening of any Circus Wagon in Louisiana?

A No.

Q "Mr. Jack Cristina may elect the following plan. 1970, Circus Wagon Units Nos. 3, 4, 5, for a total franchise fee of $40,000. 1971, Circus Wagon Units Nos. 6, 7, 8, 9, 10,11 and 12, for a total franchise fee of $120,000. 1972, Circus Wagon Units Nos. 13 through 20

for a total franchise fee of $160,000.

What does the term mean,"Jack Cristina may elect"?

MR. SEGAL: Objection, your Honor.

THE COURT: Sustained.

Q You testified that to the bset of your recollection you sold forty contracts in the State of Louisiana, is that correct? And I believe --

MR. BLOCK: I object, your Honor.

THE COURT: I have that as Pennsylvania.

MR. FEFFER: He said Louisiana.

THE COURT: Do you recall how many franhises --

THE WITNESS: He gave me the paper to look at and it said twenty.

THE COURT: Do you recall how many franchises you sold in Louisiana?

THE WITNESS: No, I don't recall. I don't think it was forty.

MR. FEFFER: I didn't say forty.

Q 13, 14, 15, 16, 17, 18, 19, 20.

THE COURT: You said forty.

MR. FEFFER: I didn't mean it.

Q 13 through 20, and that corresponds to what is on QQ, is that correct?

A Correct.

Q You were talking about a commitment, the franchise he was committed to; is that correct?

A Correct.

Q Was Mr. Cristina committed when this contract was signed --

MR. BLOCK: Objection.

THE COURT: Let him finish the question. It sounds objectionable.

MR. BLOCK: I thought he had.

Q You specified that what you were speaking about when you were giving numbers was a franchisee was committed to pay for, or committed to a certain number of franchise units; is that correct?

A Correct.

Q May I ask you, was Mr. Cristina committed when this contract was signed, to open twenty Circus Wagon Restaurants in the State of Louisiana?

MR. BLOCK: Now I object to it because it involves interpretation of the contract.

THE COURT: Sustained.

MR. FEFFER: I am not talking about the contract, your Honor. I am talking about this man's testimony. He gave a definition. Now I want to know if he is telling

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Q Did you ask for or did you collect any money for the units that were to be constructed if Mr. Cristina elected for 1970, '71 and '72?

A No.

MR. FEFFER: Your Honor, may I inquire whether Mr. Block has found that contract?

THE COURT: Mr. Block, have you found your exhibits?

MR. BLOCK: No, but if you want to put your copy in --

MR. FEFFER: I thought it was in evidence.

THE COURT: There is no question that it is in evidence.

MR. BLOCK: Wait a minute, I have it.

THE COURT: Now you can use the exhibit in evidence. It's Z, Mr. Block.

MR. BLOCK: It's Z.

Q Mr. Faris, do you recall how many units you said were distributed, on Friday, to the State of Ohio?

A (No response.)

Q As being sold units, approximately?

A Wagon Masters of Ohio?

Q That's correct.

A Around 50.

THE COURT: I'm going to allow it, if he knows. Overruled.

A I assume they didn't.

THE COURT: Do you know?

THE WITNESS: No.

Q Do you know what the commissions were that were received from Wagon Masters when this contract was entered into?

A No, I do not.

Q Did you negotiate the contract with Wagon Masters?

A Yes.

Q In fact, isn't your name signed on this contract?

A As a witness, yes.

Q Did you have certain conversations with people from Wagon Masters in which you discussed commissions --

MR. ROBSON: If your Honor please, the testimony has been clear that the commissions are not paid by the franchisees, they are paid by Richard Packing. It is a fairly standard procedure. I think the witness is being confused or misled by it.

THE COURT: Let's be sure the witness does understand the question. He is asking you about commissions, as I understand it.

THE WITNESS: We never discussed with the

franchises?

MR. FEFFER: Objection. Beyond the scope of cross, your Honor.

THE COURT: Was there some uniform practice in the franchising industry in 1969 and 1970 relative to the counting of franchises, if you know?

THE WITNESS: I don't know, your Honor.

Q Well, in connection with this business of counting franchises, in the way that you have described, was that your own idea as to how to count them or was it somebody else's idea? Do you understand what I'm asking?

A Yes, I know what you're asking. You're asking one individual and in my knowledge that was a practice I had used before and it was used by other companies that I had been involved with, but I don't say it was a practice of 500,000 franchisors.

Q But it was a practice you had followed with other companies?

A Correct.

MR. BLOCK: No further questions, your Honor.

RECROSS EXAMINATION

BY MR. FEFFER:

Q With respect to the practice that you had of counting franchises at that time, we went through what has

A Yes.

Q Have you known Mr. Deutsch for many years?

A Yes.

Q Did there come a time when you met Mr. Cohen?

A Yes.

Q How did that come about?

A Mr. Deutsch mentioned to me that there was a gentleman who had a business in the Middle West who was interested in buying a company in the East to represent him and to do business for him in the East.

Q Did there come a time when you met Mr. Milton Cohen?

A Yes.

Q Can you tell us about when that was?

A Sometime in '68, around the end of '68.

Q Did you have any conversations with Mr. Cohen and Mr. Deutsch with reference to a possible deal between Richard Packing Company and your company?

A Yes.

Q Can you recall how many conversations you had, or meetings, that kind of thing?

A With each one of them, or together?

Q About how many, overall?

A Both together or -- I had a lot of conversations

with Mr. Deutsch, many, many; and I had about four conversations with Mr. Cohen.

Q Was this over a period of several months?

A Right.

Q When you say you had many conversations with Mr. Deutsch, was that with reference to this possible deal between Richard Packing and F & T Meats?

A Yes.

Q Was an agreement finally reached as to a deal between the two companies?

A Yes.

MR. FEFFER: Objection, your Honor --

I will withdraw it.

THE COURT: He has answered it.

Q What was the deal that was to take place?

MR. FEFFER: May we have a time and who was present?

THE COURT: Yes.

Q How long after you first met Mr. Cohen would you say there was an agreement reached as to a deal?

A I would say a period of two and a half, three months; something like that. Maybe four months.

THE COURT: Let's find out when.

Can you give us an approximate time?

MR. BLOCK: I had asked him how long after he first met Mr. Cohen, which he placed in late '68.

THE COURT: That's correct, but I would like to find out, if we could, about when that would be, when an agreement was reached as to a deal.

THE WITNESS: The reason I can't give you exactly is I don't keep a diary --

THE COURT: Was it sometime in 1969?

THE WITNESS: Well, it wasn't later than that. It wasn't after '69.

Q What is your best recollection as to when it was?

A It probably was in early '69.

Q What was the deal you fellows had worked out?

A We were to get stock and we were to get a salary contract, and they were to guarantee me purchasing a new plant or building a new plant for the new business.

Q In the course of your negotiations, had you fellows actually looked at new plants?

A Yes.

Q And had a decision been reached as to which plant was going to be acquired?

MR. FEFFER: I object to the leading, your Honor.

THE COURT: Yes.

Q Had any decision been reached with respect to a new plant?

A Not that I can remember.

Q In any event, you looked at some plants?

A Yes.

Q With a view to buying them?

A Yes.

Q The deal was never consummated, was it?

A No.

Q Why was that?

MR. FEFFER: Objection, your Honor.

Q If you know.

MR. FEFFER: We can have a conversation, if one took place --

THE COURT: Yes, I think that the ultimate conclusion which would be drawn from that makes the question objectionable.

Q You say that the deal was never consummated?

A No.

Q You never got the Richard Packing Company stock; you never went to work for Richard Packing. Is that correct?

A Correct.

Q Did you have any conversation with respect to

that with Mr. Deutsch or Mr. Cohen, or with Mr. Deutsch alone, or Mr. Cohen alone? Did you ever have any conversation as to why the deal was not going through?

A The deal didn't go through because my brother decided he wanted to get cash instead of stock.

THE COURT: That is your brother, Oscar?

THE WITNESS: Right.

Q And you informed these gentlemen of that?

A Right.

Well, you see, we had made --

MR. FEFFER: I object, your Honor. I think the question was answered.

THE COURT: You informed them of that, that your brother wanted cash and not stock? The answer is "Yes"?

THE WITNESS: Right.

THE COURT: Next question, please.

MR. BLOCK: No further questions.

CROSS-EXAMINATION

BY MR. FEFFER:

Q How long have you known Mr. Deutsch, approximately?

A About ten years.

Q You testified, I believe, that the first conversation with Mr. Deutsch with respect to the buying of your

meat company took place in late '68?

A Approximately, yes.

Q Who was present at that conversation?

A Who was present?

Q Besides yourself, who else was there?

A Just Mr. Deutsch and myself, and maybe a few members of the congregation. I don't remember.

Q What did Mr. Deutsch say to you?

A That he had a company out west that was looking for a base in the east.

Q How many times did you speak to Mr. Deutsch, to the best of your recollection, about this possible purchase?

A Many, many times.

Q Did you ever have an attorney present with you when you spoke to Mr. Deutsch?

A No.

Q Was any agreement ever drawn up, any written agreement?

A No, we never drew an agreement, but we reached some kind of understanding.

Q This is the understanding your brother Oscar wouldn't go along with, is that correct?

A Yes -- I don't know what you mean by that

question. The way you said it --

Q The understanding you reached was for $20,000 in stock --

A No, the understanding was 20,000 shares of stock.

Q And some additional matters you talked about?

A Right.

Q You told Mr. Deutsch, finally, that you were not going to go through with this agreement; is that correct?

A No, I didn't tell him I wouldn't. I said my brother decided he wanted cash instead of stock.

Q And the agreement was off then?

A Right.

Q Did you ever purchase Richard Packing stock yourself?

A Yes.

Q Didn't you make this purchase about the same time you were speaking with Mr. Deutsch?

A That, I can't remember.

Q Isn't it a fact that on January 27, 1969 you purchased 300 shares of Richard Packing at 26?

A I don't remember. I know I purchased it, but I don't remember the price.

Q And you sold it a few weeks later?

A I know I sold it, also.

Q And you made a substantial profit, isn't that correct?

A I don't know what you mean by "substantial profit."

Q You made over a thousand dollars, isn't that correct?

A I don't know if that is a substantial profit in the stock.

Q Did you purchase other stock from Mr. Deutsch at that time?

MR. SEGAL: Objection, your Honor.

THE COURT: Yes, I don't see this as being within the scope of the direct examination.

MR. FEFFER: No further questions.

THE COURT: Very well.

MR. SEGAL: No questions, your Honor.

CROSS-EXAMINATION

BY MR. ROBSON:

Q Do I understand that originally your brother Oscar wanted to go along with the deal for 20,000 shares of stock and changed his mind?

A Yes.

MR. FEFFER: Objection, your Honor, there was no testimony as to that.

Q Until about June of '73?

A That's right.

Q In connection with your testimony here today, have you, at Mr. Cohen's request and my request, made a study of his personal checkbook and records?

A Yes, I have.

Q Can you tell us, sir, on the basis of your study and examination of those records, whether or not Mr. Cohen has been putting money into Richard Packing Company at any time?

A Yes, he has.

Q Commencing about when was that, sir?

A The latter part of '71.

Q And continuing up to when?

A in the '70's; '73 would be the time I went through it. I believe it was the whole year of '71 and through about June of '73.

Q In other words, your inquiry stopped about June of '73, so you are telling us about the monies that Mr. Cohen put into Richard Packing during that period you just mentioned; is that correct?

A That's correct.

Q Do you recall how much money Mr. Cohen put into Richard Packing in that period of time?

A Actual money expended?

Q Yes.

A Was about $530,000.

Q Were there other monies that Mr. Cohen put into Richard Packing Company by way of assuming any liabilities?

A Yes. There were half a dozen or so liabilities of things he guaranteed for the company, on --

Q Excuse me?

A On behalf of the company that he would be personally liable for.

Q Could you explain what you are talking about, so that the jury would be able to understand it?

A Surely.

There were a couple of bank loans that were taken out by the company and that Mr. Cohen personally, also personally guaranteed. And there were a couple of other -- I believe there was a lawsuit that he was -- judgment was passed against him, and a couple of attorney bills from the company.

Q In connection with these bank loans, in other words, you are saying that Mr. Cohen guaranteed them, the company didn't have the money to pay, so they made claims against Mr. Cohen as guarantor; is that what you are saying?

A That's right. Mr. Cohen guaranteed in order that they would continue the outstanding loan at the time.

Q How much is involved in those liabilities over and above the actual money that Mr. Cohen put into the company?

A That was approximately $130,000.

Q Had Mr. Cohen paid any of that?

A Not to the bset of my knowledge. That is the remaining part of what he is still indebted for.

Q In other words, he hasn't paid it, but he still has an obligation?

A That's correct.

Q How much of that $130,000 is represented by judgments, if you know?

A I'm not certain of the exact status of it.

Q But some of that money is represented by judgments?

A Yes.

Q Against Mr. Cohen, personally?

A Yes.

Q Are you familiar, as a result of your work with the records of Richard Packing Company during the period from 1971 through 1973, in this respect, the salary records?

A Yes.

Q Did Mr. Cohen draw any salary from Richard Packing Company during this period of time?

A No.

Q How far back does that go, do you recall, when he stopped drawing salary?

A I don't recall exactly. It must have been towards the end -- around the first of '71, I believe.

Q That he stopped drawing salary, and he hasn't received salary since, to the best ofyour knowledge?

A Not that I know of.

Q Would it be fair to say that Mr. Cohen was doing his bset to keep Richard Packing Company going?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q Was Mr. Cohen making an effort, if you know, to keep Richard Packing Company going?

A Very much so.

MR. BLOCK: No further questions.

CROSS-EXAMINATION

BY MR. FEFFER:

Q Mr. Dudovitz, when did you first come to Richard Packing?

A That was in June of '69.

his father?

A Yes.

Q What was his name?

A Joseph Cohen.

Q When did Mr. Joseph Cohen die?

MR. BLOCK: I am going to object to this, your
›r, as being remote.

MR. FEFFER: Your Honor, it has to do with the money.

THE COURT: I will permit this question, anyway. I want to see where it is going.

It is cross-examination.

Q When did he die, Mr. Dudovitz?

A I'm not certain of the date.

Q Approximately. Wasn't it around 1971?

A Yes.

Q Didn't Mr. Joseph Cohen leave a sizable estate?

MR. BLOCK: I object to that, your Honor. What is that intended to prove?

THE COURT: I can only assume something.

Are you aiming to show where the funds came from which Mr. Cohen put back, or put into the business?

MR. FEFFER: Absolutely, your Honor. There is also testimony about no salary being drawn. I want to go

into that.

MR. BLOCK: I think we ought to go to the side bar.

THE COURT: No. Overruled.

Q Didn't Mr. Joseph Cohen leave a rather sizable estate?

A I do not know.

Q Isn't Mr. Milton Cohen in his own right a fairly wealthy man?

MR. SEGAL: Objection, your Honor.

THE COURT: Overruled.

A I don't know what you term by "wealthy."

Q I want you to describe the house that he lives in in Minneapolis-St. Paul.

MR. BLOCK: I object to that.

THE COURT: Sustained.

MR. FEFFER: Your Honor, there has been a series of questions --

MR. ROBSON: If your Honor please, I object to any speeches.

MR. FEFFER: I think this is important, your Honor.

MR. ROBSON: It may be important, but I still object to speeches.

A I believe in the latter part of '72 .

Q When was that?

A There was one in Grand Rapids and the other one was in St. Paul.

Q When did the ones in California close.

A I am not certain of the dates.

Q How many units were open in 1972?

A I can't be sure. I would say two or three.

Q What were your primary responsibilities in 1971 and 1972?

MR. SEGAL: Objection, your Honor.

THE COURT: Overruled. There was testimony, Mr. Segal, about his being controller during a period up to late 1971. My understanding is that he was not there between late 1971 and June, 1972. So you might want to rephrase your questions.

Q In 1971 what were your primary responsibilities, before you left?

A It was a combination of -- I did everything I could in respect to Circus Wagon. I was actively involved with the units, we had nobody to oversee them, and I was actively involved in Resort Products at the same time.

Q Weren't you the person at the company primarily responsible for the dune buggy operation at that time?

A I would say so.

Q Isn't that true when you returned to the company, weren't your responsibilities heavily involved with that company?

A With reference to June of '72--

Q When you returned in '72, yes.

A It was really anything I could do at that time. You know, you speak on the operation of Circus Wagon, but even if there weren't many units open there were still other obligations and things that had to be done.

MR. FEFFER: I have no further questions, your HOnor.

MR. SEGAL: I have no questions, your Honor.

MR. ROBSON: No questions, your Honor.

THE COURT: Mr. Block?

MR. BLOCK: Just let me confer one moment, your Honor.

THE COURT: Of course.

(Pause.)

MR. FEFFER: Your Honor, may I ask just one more question?

THE COURT: Yes.

BY MR. FEFFER:

Q Was there any effort in 1972 when you returned to sell franchises, on your part?

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you have covered the matter of an oral conversation with him.

Now, why don't you take it one step at a time, Mr. Block?

MR. BLOCK: I have attempted to do that and I am running out of steps, your Honor.

THE COURT: There is one more, if you would take it.

MR. BLOCK: Then we are playing games, if I may respectfully say so, and I would appreciate an opportunity to approach the bench.

THE COURT: Let me ask the witness two questions:

You indicated that you wrote to Mr. Surnow on two or three occasions?

THE WITNESS: That is correct.

THE COURT: Did you also receive correspondence from Mr. Surnow in response to those inquiries, or were all the writings only from you to him?

THE WITNESS: I did not receive anything directly from my correspondence to him.

Q Did you receive anything indirectly?

MR. FEFFER: Objection, your Honor. He is asking for conversations.

THE COURT: Let's find out if he received anything

in writing, if not directly, in a way that might be described as indirectly, from Mr. Surnow.

THE WITNESS: The best I could say would be that Mr. Surnow did send a letter in respect to this commitment. He was --

MR. FEFFER: Objection, your Honor.

THE COURT: He sent a letter. Was that letter he sent sent to you?

THE WITNESS: No, sir.

THE COURT: Ask your next question, Mr. Block.

Q Who was it sent to?

A Mr. Cohen.

Q What did the letter say?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q Did you see the letter?

A Did I see the letter?

Q Yes.

A Yes, sir.

Q Let me ask you this question: To your knowledge, has a search been made by you and Mr. Cohen for that letter?

A Not by myself, but I know Mr. Cohen --

MR. FEFFER: Objection, your Honor. How does he

know, for example.

THE COURT: As far as you know, was a search made by either of you?

THE WITNESS: Yes, sir.

Q Has the letter been able to be found?

A Not that I am aware of.

MR. BLOCK: Then, if your Honor please, I know the letter itself is the best evidence, and we don't have the letter, and I would like to adduce the witness' recollection of its contents.

MR. FEFFER: Objection, your Honor. The best evidence would be Mr. Surnow.

MR. BLOCK: We are trying to get him.

MR. ROBSON: The best evidence is not necessarily Mr. Surnow and I object to that comment.

THE COURT: Yes, the jury will disregard these comments.

If you will ask your next question, I will listen to it. If there is a pending question, I will have the reporter read it back.

MR. BLOCK: There is a pending question, your Honor.

(Record read.)

Q What did Mr. Surnow say in response to the letters

that you had written him?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q Was a commitment made by Mr.Surnow?

MR. FEFFER: Objection.

THE COURT: Sustained.

Q If you know.

MR. FEFFER: Objection.

MR. BLOCK: I am asking the witness if he knows.

MR. FEFFER: It is based on hearsay.

MR. BLOCK: No, it is not. He is there as the controller of the company and he sees the correspondence.

THE COURT: May we approach the side bar, your Honor?

THE COURT: You may.

(At the side bar.)

MR. BLOCK: My offer of proof is this: We don't have the letter. Somehow or another it has become lost. This witness is under oath and he saw the letter. When he says it was addressed to Cohen,it was addressed to Cohen and Richard Packing Company.

My offer of proof is that this witness will testify that that letter talked about the $20,000,000 commitment.

Mr. Cohen from Surnow -- what did that say, to the best of your recollection?

THE COURT: I want to find out a few things first:

You indicated, just before the side bar, that you understood a search had been made for the letter from Mr. Surnow.

THE WITNESS:That is correct.

THE COURT: You understand that the letter can't be located?

THE WITNESS: Right.

THE COURT: Do you remember the date of the letter?

THE WITNESS: I'm sorry, I don't.

THE COURT: Do you remember if it was a one-page letter or a two-page letter or a three-page letter?

THE WITNESS: I am afraid I don't, for sure.

THE COURT: Do you remember to whom it was addressed?

THE WITNESS: To Milton Cohen.

THE COURT: Personally?

THE WITNESS: Yes.

THE COURT: Do you remember the letterhead, if any?

THE WITNESS: No, I don't.

THE COURT: Do you remember how the letter ended? Was there a signature?

THE WITNESS: I am quite certain there was. I am sure there was a signature yes.

THE COURT: Do you remember the name that appeared?

THE WITNESS: Jack Surnow.

THE COURT: Was the signature in ink writing, ro did you see some sort of a copy?

THE WITNESS: No, it was the original.

I am really quite vague on the letter.

THE COURT: You saw a letter --

THE WITNESS: Yes.

THE COURT: -- to Mr. Cohen from Mr. Surnow?

THE WITNESS: Yes, sir.

THE COURT: What was the date of it?

THE WITNESS: I don't recall.

THE COURT: You don't recall?

MR. FEFFER: Could we have an approximation, your Honor?

THE WITNESS: I would ...ve to approximate in the area of April '70.

THE COURT: Do you have a recollection of the contents of this letter?

THE WITNESS: Actually, my recollection is quite vague.

If I may, Mr. Cohen was --

THE COURT: No, don't go into that.

THE WITNESS: I don't know what to say, your Honor.

MR. FEFFER: I object to anything further on this, your Honor.

THE COURT: He says his recollection is vague. You may take it from there.

BY MR. BLOCK:

Q Do you remember anything about what was said in the letter, sir?

A Yes.

Q Would you tell us what you recall?

MR. FEFFER: Objection.

THE COURT: Overruled.

A I do recall mention of a financial commitment that he was working on for the company. To the best of my recollection, I recall mention of $20,000,000, which was the figure he was looking for. This stands out in my mind as a fact in the letter.

I can't honestly recall and be positive as to what else was said in it, but it was on that order. The

letter was strictly in reference to this commitment he was working on for the company.

That was the content.

Q Did you have any conversations with Mr. Cohen on that subject after the letter came in?

MR. FEFFER: Objection.

THE COURT: Sustained.

MR. BLOCK: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. FEFFER:

Q Are you sure about the date of that letter?

A Am I sure? No.

Q You testified that you had no clear recollection as to the letter, is that correct, except for this $20,000,000?

A To the contents?

Q Yes.

A No, I don't.

Q How many pages was the letter?

A I don't know.

Q Did Mr. Surnow have his name signed or was it typewritten?

A I'm pretty certain it was signed --

MR. ROBSON: Your Honor, this was asked and answered. I object.

A I am pretty sure it was signed; quite sure.

Q Yet you are able to recollect that the date of the letter was April 1970; is that correct? You remember seeing that date on the letter?

A No, I did not.

MR. BLOCK: If your Honor please, I object to counsel misstating the testimony of the witness.

THE COURT: What is your best recollection as to the date?

THE WITNESS: I can give you the basis for my saying that.

THE COURT: No, what is your best recollection as to the date?

THE WITNESS: My best recollection would be in the area of April 1970.

Q Let me show you 64 in evidence, and ask you to look at that and see if that may refresh your recollection.

(Pause.)

A All right, sir.

Q Does that assist you in refreshing your recollection as to the date?

A Not really.

Q Did you ever receive a commitment for $20,000,000?

A No --

MR. BLOCK: The actual money?

Q The actual money; I'm sorry.

A No, we did not.

Q Did you ever receive anything from Mr. Surnow?

A Not that I remember.

Q Did you ever issue a press release to the financial community telling them that this money was not

going to be available?

MR. BLOCK: Objection. No such evidence.

THE COURT: Overruled.

Would you please rephrase that?

Q Did you ever issue a press release to the financial community telling them that this money was not available?

MR. ROBSON: If your Honor please, there is an inference in that that there is an obligation to issue such a press release.

THE COURT: Somebody says there was.

Overruled.

MR. BLOCK: That is like asking whether he stopped beating his wife last week.

THE COURT: Is there an answer?

A No, there is no reference made to it at all.

Q You know Mr. Jack Hurley, don't you?

A Do I know Mr. Hurley? No.

Q You never met Mr. Hurley?

A Never met him.

Q Did you ever talk to him on the telephone?

MR. BLOCK: I submit, if your Honor please, this is outside of the issues.

THE COURT: Yes, it is.

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AFTERNOON SESSION

1:50 p.m.

(In open court; jury present.)

THE COURT: You may proceed, Mr. Block.

MR. BLOCK: The defendant Cohen calls Mr. Louder to the stand.

W I L L I A M L. L O U D E R, J R.,

called as a witness by the defendant Cohen, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BLOCK:

Q Mr. Louder, are you appearing here pursuant to subpoena?

A Sir?

Q Are you appearing here pursuant to subpoena?

A No, sir.

Q You were never subpoenaed, or --

A No, the only subpoena, the firm had a record subpoena. But, to my knowledge, I have not received a subpoena.

Q Where do you reside, sir?

A In St. Paul, Minnesota.

Q Are you connected with the present firm of Coopers & Lybrand?

A Yes, sir.

Q What is your position now with that company?

A I am a CPA and a partner in the firm.

Q Was that firm known by a different name in 1969 and 1970?

A Yes, sir.

Q What was the name of the firm then?

A Lybrand, Ross Brothers & Montgomery.

Q Were you connected with the firm at that time?

A Yes, sir.

Q How long have you been connected with the firm, Coopers & Lybrand, and its predecessors?

A I started with the firm in '52; I left for the service for three years, returned in '55 and have been with them since.

Q Sir, was there an engagement that -- and we will call it Lybrand, Ross Brothers, that was the name it was known as in those days -- was there an engagement by Richard Packing Company in 1969 of Lybrand, Ross Brothers?

A Yes, sir.

Q What was that engagement?

MR. FEFFER: Can we have a time, your Honor, an approximate date?

THE COURT: Yes.

Could you tell us when, or approximately when, your firm was engaged to perform accounting services for Richard Packing Company?

THE WITNESS: Richard Packing had been a client for a number of years.

What happened in '69 is we were engaged to perform an audit. Prior to that time we gave tax assistance and general accounting assistance.

Q About when did you start working on the 1969 audit? And when I say "you," I mean the firm.

Were you in charge pretty much?

A I was in charge, but I would have staff men at the client's offices performing the audit.

Q Right. So you were in charge.

My question is this: When did your company start performing the 1969 audit, to the best of your recollection?

A I don't recall the specific date, but it would be sometime before June 30th because one of the requirements was to -- in an audit, is to observe inventories, and we had to be there before the year-end date to observe the inventories.

Q That was June 30th of 1969?

annual report for which you did the figures, you and your company?

A Yes, sir.

Q Looking at that document, am I correct that the balance sheet was audited in that report? Is that correct?

A Yes, sir.

Q What does that mean, sir, in accounting terms, when you audit or eport figures and say that they are audited figures in connection with the balance sheet?

A The basic financial statements consist of a balance sheet which list assets and liabilities, net worth.

It also consists of a statement of net income which shows income and earnings reference, and it also shows shareholders' equity, which shows transactions, sale of stock, et cetera, in equity section.

At that time; since then there is one other statement of changes which was not required in '69, plus the notes to financial staatments. The balance sheet in this case -- our opinion can be generally directed to all the financial statements, but we can give an opinion on just the balance sheet.

In the case of this company, it was their first audit. One of the requirements in auditing a

statement of income is that where inventory is material in the determination of income, you have to observe the inventory or satisfy -- the beginning inventory as well as the ending inventory, or to satisfy yourselves by other means.

When we were engaged, we were asked to perform a complete audit of all the ifnancial statements. In going back to the prior year, which had not been audited, we tried to satisfy ourselves as to beginning inventory by various means and ended up not being able to do so, at which time the scope of our audit was reduced to just doing the income statement.

a.m.

Q Am I not correct, you were able to certify the correctness of the balance sheet, is that what you're saying?

A We rendered an opinion on the balance sheet. There were some qualifications which should be noted in our report.

Q You are referring to the certificate on the last page, is that correct?

A Yes. Actually the financial statements and notes are the company's representation. We audit or test or examine the financial statements and then render an opinion. So the opinion which you commonly see with the accountant's name and the accountant's signature is the fact that they give an opinion that it does present fairly or that it doesn't. In this case, we had a qualified report.

Q With respect to the balance sheet did you give us your opinion that that was correct pursuant to generally acceptable accounting standards?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q What was the opinion you gave with respect to the balance sheet?

MR. FEFFER: Objection. It's in evidence.

THE COURT: Sustained. It is in evidence. I think that's the point counsel makes.

MR. BLOCK: This is a certificate which the witness prepared and since we are dealing with a rather abstruse subject, a little explanation would be in order.

THE COURT: The background is fine, but his opinion is set forth in evidence in written form and you can read from it, Mr. Block.

Q With respect to the balance sheet, sir, I'd like to read the first paragraph of the accountant's report; that's the certificate.

A That's the scope. The first paragraph tells what we did.

Q It reads this way and I am reading from the 1969 annual report, it's Exhibit 13A in evidence:

"We have examined the balance sheet of Richard Packing Company at June 30, 1969. Our examination was made in accordance with generally accepted auditing standards and accordingly included such testis as the accounting records and such other auditing procedures as we considered necessary under the circumstances."

And then the next paragraph says:

"In accordance with the terms of our engagement we have not examined the statement of income and shareholders equity for the year ended June 30, 1969, which have been prepared from the books and records without audit. Accordingly,

we express no opinion on the statements of income and shareholders equity.

"In our opinion, subject to the ultimate realization of investments and advance to subsidiary and associated companies through profitable operations of these companies and the obtaining of adequate financing for these companies which are newly organized and operating, with newly developed products as explained in note 2 to financia statements, the accompanying balance sheet presents fairly the financial statement of Richard Packing Company at June 30, 1969 in conformity with generally accepted accounting principles applied on a basis consistend with that of the preceding year."

Is that what you meant, sir, when you say you certified the balance sheet with certain qualifications?

A Yes, sir. The qualifications being a part of the "subject to ." Following our opinion it says "Subject to the ultimate realization," etc. That is the qualification.

Q You were not able, however, to render an opinion as to the correctness of the statement of income, isn't that correct?

A Yes.

Q And why was that, sir? Was that attributable to the inventory that you mentioned before?

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q Why was that?

MR. FEFFER: Objection, your Honor.

THE COURT: In this case where we have an accountant who is going to be discussing opinions, I am going to permit an answer.

Q Why was that?

A As to why we did not give an opinion on the income statement?

Q Yes.

A Again, I mentioned this earlier, we tried to substantiate the beginning inventory records which require normally either a variant, which was impossible to do at that time, or by some other manner of establishing the beginning balances, such as perpetual inventory records, of which there were none; substantial shipments in time that there would not be any time to make enough production to meet that, and none ofthose procedures were possible. So after a good deal of effort we decided that it was not possible to give an opinion on the income statement.

Q When was your report completed, sir, and if you want to refer to the document, you can do so.

A I can just give the dates on our report. It is

December 29, 1969, which indicates the date we completed our field work. And then we say except March 20, 1970 as in notes 2 and 3, and that covers certain facts and notes 2 and 3 which were updated before the reports were issued.

Q What does updating mean?

A We put in more current information.

Q Can you give us an example?

A For instance, in note 2, we disclosed advances to subsidiaries which had increased substantially since the balance sheet day, and in note 2 we put in updated market values of securities where the market values had changed substantially from the balance sheet date.

Q So, in other words, your report, at least in the notes, brought the situation up to date from June 30, 1969, is that what you're saying?

A No. The only thing updated were the two items I mentioned because there were major changes since the date of June 30th and we went back and did enough additional work only in these two areas to updatethem, no others. We didn't update everything else. If we thought it was major, we might have considered it, but--

Q Why, sir, did it take your company from, starting let's say, some date before June 30, 1969, to December of 1969 to finish your field work?

A Well, there were a number of matters. First, you had a new company -- not a new company, but fairly new, and theyhad never been audited before. There were certain records that have to be prepared, the books have to be posted to date and certain accounting analysis, all of which is done by the client. As an auditor you have to be independent

and you can't be a bookkeeper and an auditor otherwise you're auditing yourself.

So we allow time for the company to bring their records up to date. In this instance there were also some acquisitions made which those books -- there were not financial statements available and they had to be brought up to date. You go through the process of the company bringing their books up to date, preparing the analysis, schedules of detailed accounts and in addition there were a good deal of very complex accounting problems to be resolved in this audit.

Q Was the operation of Richard Packing Company during this period that you were working on it a fairly far-flung operation, geographically, do you recall?

A Well, within the United States, the subsidiaries were located in Los Angeles and they did have operations somewhere in the Carribean, I believe, and Bermuda, and we used an office down there to do work. They had inventory in Bermuda and manufacturing operations -- actually the operations in California were much larger than they were in St. Paul.

Q So it was a rather complicated set up?

MR. FEFFER: Objection.

THE COURT: Sustained. He didn't say that.

THE COURT: Tell us, if you can, or, say, in January of 1970 if you finished your field work at the end of December, '69, why wasn't the report issued shortly thereafter?

THE WITNESS: We finished our field work but at thattime we started to put the notes together, and everything like that. I would have to, I think, go to the work papers to give specific reasons as to what was done at that time and what still remained at that time.

Q But your best recollection is that it was the preparation of the notes, bringing it up to date?

A Yes, sir.

Q Why did the field work take from sometime in June of 1969 until Deceuber of 1969 to be completed?

A Well, in the newly acquired companies they had to take inventories for the first time and price the inventories and the product was such, and it was a new product, and there were models involved in the body of the dune buggy and in the round boat and we had to come up with costs of those models and they would be capitalized, a fixed asset, and the company had no cost system, no previous history of evaluating these things or keeping track of these costs in a manner that accountants normally do, and management didn't have the experience or the level of accounting ability to do that.

Normally, management would price the inventory and we would substantiate the prices and they would determine the cost of models, and so forth. In this case, none of that had been done, we had to work with them and try to come up with these costs, and that took time. It took time to get the information, to make the decisions, and so forth.

Q It also took time to check out the inventory.

A That's the inventory of Resort Products --

Q No, I'm talking about the inventory --

A The inventory of Richard Packing was fairly simple. It was Resort Products, the dune buggies and boats that took a lot of time, and also the costs. The one question of Resort Products would be, recognizing the franchise income -- that took some time too.

Q Were there other problems you had in connection with this audit, in connection with calculating franchise income, and that sort of thing --

A Yes. At that time there was a lot of discussion of when to recognize the income when you sell a franchise. There were some articles written on it, and the American Institue of CPA's had not issued a definition of how to recognize that income. So we had to spend a good deal of time ourselves reviewing the contracts to try to see what the current status was in the accounting literature as to

what the best accounting would be. There was a question of accounting and then applying that accounting to the contracts for those franchises that Richard Packing had contracted for.

Q The question I asked you just a couple of minutes before related to the problem you said you had in verifying the opening inventory of Richard Packing Company? Do you remember you talked about that?

A Yes.

Q And I asked if that was a time consuming operation as well.

A Oh, yes. Work had to be done to try to establish thatinventory and when we finally were unsuccessful, all that work was just wasted and we went back to the other things, concentrating on the balance sheet.

THE COURT: I'm a little confused. You just answered relative to Richard Packing but a few moments ago I thought you said the Richard Packing inventory was simple but that you had problems pricing the inventory of Resort Products?

A There are three things there. First, let's take Richard Packing.

We had the beginning inventory and the ending inventory, both of which you have to be able to be satisfied with in order to give opinion on the income statement. The

beginning inventory we could not substantiate. The ending inventory was fine. We were there to observe the inventory, we could see the management's counts of the inventory and the pricing was relatively simple. The beginning inventory we were not available to observe it. The other inventory I talked about was the companies that were acquired in California, and there we had manufactured products which were quite complex and pricing had not been done before.

We also had molds which were developed by the company themselves and we had to come up with a cost, because you record the cost on the balance sheet, of those fixed assets, and those inventory items, and without a cost system we had to go back and try to create history and make statements to come up with the amount to be capitalized.

Does that clarify it, sir?

THE COURT: Thank you.

MR. BLOCK: I have no further questions.

THE COURT: Mr. Feffer, you may examine.

CROSS EXAMINATION

BY MR. FEFFER:

Q Mr. Louder, you testified to doing quite a bit of work on the 1969 annual report, and I believe the date on the back, your letter, is December 29, 1969?

A Yes, sir.

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Q Is it not correct that on that date you had completed the work you described?

A We had completed the field work, examining the client's records, at that time.

Q Do you normally write a letter, as is contained on the back page of the annual report, before your work is finished?

A You mean do we write our report here at that time?

Q Yes.

A Sometimes we do; sometimes we don't.

Q Do you recall how long it took you once you finished the field work to compile it in the form that you see now, until you were ready and finished with the product?

In other words, after --

MR. BLOCK: I object to that.

Q After December 29th, can you recall approximately how long it took you to put the information together to present it to Richard Packing Company?

A Well, it would have taken beyond the March 20th date, because we went back and updated --

Q I am talking about as of December 29, 1969; at that point, what did you do?

A We had to evaluate the audit, the information

we had, to determine whether we would render this opinion, and, of course, the items here that we qualified it for were the items we considered.

Most reports go out in what we call clean opinion, not qualification. When you have a qualification, it is carefully considered, and that is what we did here.

Q You wrote that letter to the board of directors on the 29th before you in fact knew that it was accurate?

A No. This report was issued sometime after March 20th.

Q I understand that, but you said -- it is dated December 29, 1969?

A Yes.

Q And it makes certain representations on behalf of Lybrand, Ross?

A December 29th is the date you complete your field work and under the standards of our profession, it says that you date your report the date you finish your field work.

That is not the date you issue the report.

Q I am not talking about the physical issuance of this report.

A We don't have anything to do with the issuance of this report.

Q As of December 29, 1969, were you able to make the representations that are contained in that letter?

A No.

Q How long did it take you thereafter, if you can recall, to make the representations that are contained in this letter?

A It would have been sometime after March 20th.

Q Sometime after March 20th?

A Yes, sir.

Q Did you have all the information that you needed to compile the 1960 annual report in hand on December 29, 1969?

A No.

It is hard to say yes or no.

Q What information didn't you have as of that date?

A The field work had been completed, the evidence, the normal testing, and so forth, but we can't issue a report until we complete the evaluation basis.

I don't recall what all we did after that date. I am not positive. We could have been in a position where we had not yet made the decision as to when to recognize the franchise income.

We may have had the information and were making

5 rmmch **** Louder-cross

A No. I think if you read the paragraph before, that explains that.

Q I understand that, but is this number affected in any way by the accounting change you referred to, or is it just the income from these franchises?

A We are saying they had 6 units on which they collected money, I believe. If I could see that --

Q Sure (handing).

A I apologize.

If this was a year ago, I would have been more familiar with it.

We say at June 30,1969, the company had entered into 6 franchise license agreements for Circus Wagon Restaurants.

Q Those are the only agreements for which money had been received?

A At June 30th, yes, sir.

Q Did you prepare subsequent annual reports or just the '69 one?

A No. They engaged other accountants after us.

Q I notice that you say there are 6 units, and then in the next paragraph, there is, "In addition, the company entered into agreement for the execution at future dates of 12 license agreements, for an aggregate sales

price of $190,000"; is that correct?

A Yes.

Q Are those numbers at all -- were they affected in any way, the 6 and the 12, by this change in accounting principles that you referred to, in terms of just the number of units?

A No, but maybe somebody would have said those others should be recognized as income.

Q That would have no effect on the number of units stated there, 6 and 18 --

MR. BLOCK: 6 and 12.

A I don't see where it has any accounting significance. The accounting significance was whether you should recognize the dollars or not.

The number of units, whether it was 1 and 120, or 10 and 120, it didn't make any difference accountingwise.

MR. FEFFER: I have no further questions.

CROSS-EXAMINATION

BY MR. SEGAL:

Q Mr. Louder, as a result of the alteration in accounting principles, was it necessary for you to eliminate the listing of franchises that had been obtained by Richard Packing?

A I don't understand what you mean.

10 rmmch **** Louder-cross

show more or less profit in a period if your beginning inventory is not correct.

Q That is a very painstaking process, is it not, working back to a starting inventory from a closing inventory?

A Yes.

Q It is a time-consuming process?

A Yes.

Q With respect to this annual report or financial report, did you ever have any conversations with Mr. Cohen or anybody in the company with respect to the date when that report would be complete?

MR. FEFFER: Objection, your Honor.

THE COURT: Well, let's just get a yes or no answer.

Do you recall?

A In the course of an audit, there are a number of conversations, and certainly when we are going this long, there are questions of when the audit will be finished.

So, yes, there were questions.

Q Did you have conversations with Mr. Cohen with respect to when the audit would be complete?

A Yes. I don't recall anything specific, but there were questions from he and his associates as to when

we would be finished.

Q Can you recall specifically any conversations with Mr. Cohen?

A Not any specific ones, no.

Q Can you recall in substance the general nature of the conversations with Mr. Cohen about the date when the report would be completed?

A Just the normal client saying, "When are you going to get done, get it out," and so forth.

MR. ROBSON: No further questions.

MR. BLOCK: I have nothing further, your Honor.

MR. FEFFER: Nothing further, your Honor.

MR. SEGAL: Nothing further.

THE COURT: You are excused, Mr. Louder, and I thank you for coming.

(Witness excused.)

MR. BLOCK: If your Honor please, the defendant Cohen rests at this time, subject to a condition which I stated to your Honor at the side bar.

THE COURT: Very well.

Mr. Segal?

MR. SEGAL: At this time, your Honor, I would like to mark in evidence certain items which have been obtained from Financial Programs.

MR. BLOCK: No, your Honor.

THE COURT: Very well, you may proceed, Mr. Robson.

MR. ROBSON: We call Mr. Harvey Pohl.

H A R V E Y P O H L, called as a witness by the defendant Duboff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBSON:

Q Mr. Pohl, what is your occupation?

A I am a certified public accountant.

Q How long have you been a certified public accountant?

A Since 1960.

Q Are you certified in the State of New York?

A I am.

Q Are you with a firm?

A Yes.

Q What is the name of that firm?

A Levine & Pohl.

Q Did there come a time when Levine & Pohl were retained by the firm of Kelly, Andrews & Bradley, Inc., to act as their auditors?

A Yes.

Q Do you know approximately when that was?

A It was sometime in the late '60's. I couldn't identify it.

It was pretty close to the inception of the firm.

Q If I tell you the firm commenced business approximately the first or second week of September, 1968, would that refresh your recollection?

A It would probably be within a six-month span.

Q How long did you continue as their auditor?

A To my knowledge, until they effectively went out of business.

THE COURT: When was that, in point of date?

THE WITNESS: Again, it is difficult for me to identify.

My partner, who was the principal partner in charge of Kelly, Andrews & Bradley's work, I assisted him at times on our audit engagements, so my memory isn't entirely clear. But it was probably '71 or '72. Probably '71, I would think; '70 or '71.

Q Did there come a time during the course of your employment or retention by Kelly, Andrews & Bradley when your firm commenced work on an annual audit?

A Yes.

Q Do you remember what the fiscal year was?

A Yes. I'm pretty sure their fiscal year was May 31st.

Q So that sometime after May 31, 1969 you would have been performing services in connection with an audit for the year ended May 31, 1969; is that correct?

A Yes.

Q In the course of that audit, did you and/or your partner prepare workpapers from time to time with respect to material that you had discovered?

A We did.

(Defendant Duboff's Exhibit X was marked for identification.)

Q Mr. Pohl, I show you what has been marked Defendant Duboff's Exhibit X, which consists of two sheets of paper, and ask you whether you can identify that document?

A Yes. It's an analysis that I prepared on July 2, 1969.

Q Is that your handwriting which appears on the top sheet?

A Yes.

Q What about the document which is attached to the top sheet, do you recognize that?

A I can't say that I do. I may ver well have seen it, but I don't recall. I see that I indicated that --

Q Don't tell us what is in there.

You recognize the top sheet as a worksheet which you prepared?

A Yes.

Q But you don't recognize the bottom sheet.

A No.

It's four or five years ago.

Q Was this prepared in connection with the audit of Kelly, Andrews & Bradley?

A Yes.

Q Was this sheet among the sheets which was turned over to the United States Attorney's Office by your office?

A That's correct.

MR. ROBSON: Your Honor, I'd like to offer the top sheet. I would remove the bottom, since the witness says he does not specifically recall it.

MR.FEFFER: May I ask some questions on the voir dire, your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. FEFFER:

Q Mr. Pohl, you testified that the top sheet is all in your handwriting, is that correct, all the entries thereon, the bottom included?

A No, I didn't say that. Just that I recognize it's my handwriting.

This notation in the lower right-hand corner is not my writing.

Q How about the bottom?

A Yes. Everything else except that is mine.

Q This document when it was presented to you was stapled together, is that correct?

A Just now, yes.

Q Was this document, the top document, prepared by you in the regular course of business?

A Yes.

Q Was the second document maintained -- the document that I am now holding in my hand -- was that maintained by your firm also in the regular course of business?

A I don't know.

Q Were these documents subpoenaed from you?

A I believe that our workpapers were turned over to the U. S. Attorney's Office, to some extent. I don't know to what extent.

Again, my partner handled the Kelly, Andrews & Bradley account. He was directly involved in the turnover to the U. S. Attorney's office.

Q This document makes reference to an attachment, is that correct?

A Yes.

MR. FEFFER: Your Honor, at this point, this document was attached originally I think in view of completeness, that all of the exhibit should be received together.

THE COURT: You have no objection to the entire exhibit being received?

MR. FEFFER: No.

MR. ROBSON: I had no objection, either. I just didn't have a foundation for it.

THE COURT: I appreciate that. Apparently, there is no objection from the Government.

Let's just show it to Mr. Block and Mr. Segal.

MR. FEFFER: I have one further question.

BY MR. FEFFER:

Q Who did you communicate with at Kelly, Andrews & Bradley with respect to the work you did?

A I think there were various people that I communicated with.

Q Do you know a Mr. Daniel Driesman?

A Yes, I had spoken to Dan Driesman, but I think that with respect to this particular audit, my recollection is that I had no dealings at all with Mr. Driesman. He didn't become active in this thing until later on.

Q Active in what thing?

A As far as managementwise.

Q So your testimony is, on the date of this document, Mr.Driesman --

MR. ROBSON: Your Honor, I don't think this is proper voir dire.

MR. FEFFER: I'm trying to find out how this was prepared, your Honor.

MR. ROBSON: It was prepared in the course of an audit.

THE COURT: If you want to go into those matters on cross-examination, you may. He said he prepared this in the regular course of business. If you want to ask him anything specifically along the lines of how or when, you may. I think that is quite appropriate.

But I don't think that other matters should be be gone into now.

Q This was prepared on the date listed here, that would be July 2, 1969; is that right?

A Yes.

MR. FEFFER: I have no objection.

THE COURT: Would you show the document to Mr. Block and Mr. Segal?

(Pause.)

MR. BLOCK: No objection.

MR. SEGAL: No objection.

THE COURT: Received.

(Defendant Duboff's Exhibit X was received in evidence.)

MR. ROBSON: With your Honor's permission, I'd like to read certain items here to the jury.

(Mr. Robson read to the jury from Defendant Duboff's Exhibit X in evidence.)

BY MR. ROBSON:

Q Does "PH" stand for Harvey Pohl?

A Right.

(Mr. Robson read to the jury from Defendant Duboff's Exhibit X in evidence.)

Q Do you recall, Mr. Pohl, the items which are included on this worksheet, the three $15,000 checks?

A Yes.

Q Did you have occasion to have any conversation with anybody about those $15,000 checks?

A Well, in the course of my work, I was attempting to verify all assets and liabilities of Kelly, Andrews & Bradley, and look into any expense items which might be of a different, unusual, extroardinary, unusual nature, and this was one of them.

The documents that I saw relating to it were vague as far as the description of what services encompassed --

MR. FEFFER: Your Honor, I think Mr. Robson asked for a conversation.

THE COURT: Yes, I don't think it is responsive so far.

Do you want to strike it?

MR. FEFFER: Yes, your Honor.

THE COURT: Strike it. The jury will disregard it.

Read the qustion back.

Q I can repeat the question.

Did you have a conversation with anybody with respect to checks payable to Reiss & Company?

A Yes.

Q With whom did you have that conversation?

A Bernie Shwidock.

Q Do you recall when approximately that conversation

took place?

A July 2, 1969.

Q Where did that conversation take place?

A In the offices of Kelly, Andrews &Bradley, somewhere on John Street, I think they were located.

Q Would you tell us to the best of your recollection what you said to Mr. Shwidock and what he said to you?

A I found --

Q Just tell us what you said.

Is that what you said to him?

THE COURT: What you said to him and what he said to you. Just tell us the conversation.

A The conversation was that I have these three items of expense, three $15,000 items being paid to Reiss & Company. The documents on them rendered to Kelly, Andrews & Bradley were kind of vague as to what type of advisory services they are,"and would you fill me in on just what is, Bernie?" That was the conversation.

Q What did Mr. Shwidock say?

A His response to me was that it was regarding some Israeli deal that they had been working on.

Q Was it pursuant to that conversation that you made this notation on this worksheet?

A Yes.

MR. ROBSON: No further questions, your Honor.

CROSS-EXAMINATION

BY MR. FEFFER:

Q Let me show you 24-A and 24-B and ask you to look at the pink sheets that are attached to each.

Are these the invoices which --

A I couldn't say for sure. They very well might be.

Q These are the types of invoices that you are referring to that were vague?

A Again, I am still vague as to whether this is what I actually saw.

Q Why don't you read that?

A I see.

Q Is that similar, to the best of your recollection, to the type of thing that you and Mr. Shwidock talked about?

A I can't recall whether this was or not.

Q But is it similar?

A I can't recall whether it was similar.

Q You testified that the invoices that you saw referred to services rendered for the Reiss Bank; is that correct?

A Well, to the extent that those pink sheets read services rendered for specific months, they are similar, yes.

Q Doesn't 24-A in fact say, "For services rendered in our advisory capacity for the months of September, October and November, 1968"?

A Yes.

Q And doesn't 24-B say the same thing with respect to other months?

A Yes.

Q And the second page on 24-B say the same thing?

A I didn't see the second page.

(Document handed to the witness.)

A Yes.

Q So these would be similar to what you saw, is that correct?

A I don't remember precisely what I saw.

MR. FEFFER: No further questions,your Honor.

MR. BLOCK: No questions, your Honor.

MR. SEGAL: No questions, your Honor.

MR. ROBSON: No questions,your Honor, but could I take just one moment to pass this exhibit to the jury?

THE COURT: Yes.

Do you want me to excuse the witness?

MR. ROBSON: You can excuse the witness --

MR. FEFFER: I'm sorry, your Honor, may I ask one question? I overlooked one thing.

THE COURT: All right.

BY MR. FEFFER:

Q What is your best recollection as to when Mr. Driesman started to work at Kelly, Andrews & Bradley?

MR. ROBSON: Objection.

MR. SEGAL: I object.

THE COURT: Overruled.

A It was sometime after I first became involved with them. I would say probably about a year.

I was there very, very rarely.

Q What is your partner's name?

A Robert B. Levine.

Q Wasn't Mr. Levine the person who handled the audit that you referred to, primarily?

A Primarily, yes. I was just assisting him on this particular audit.

Q Was Mr. Levine present during this conversation with Mr. Shwidock?

A I don't recall. He may have been there that day and he may not have been. There were times when I was up there by myself. I knew what had to be done and

I tried to do it. He didn't have to be around.

Q I understand that.

Was Mr. Driesman a certified public accountant?

MR. SEGAL: Objection, your HOnor.

THE COURT: Overruled.

A I heard only recently, within the last five or six months, that he was a certified public accountant, from a third party.

MR. FEFFER: No further questions.

THE COURT: All right.

Anything else of the witness before I excuse him?

MR. FEFFER: Wait a minute, your Honor. I wanted to get a document from downstairs and it just arrived.

(Pause.)

MR. FEFFER: I'd like to have this marked, your Honor.

(Government's Exhibit No. 93 was marked for identification.)

BY MR. FEFFER:

Q I want to show you what has been marked as 93 for identification and ask you to look at the first page and the date specifically thereon.

A Yes.

Q And then ask you to look at the information

contained therein and see if it doesn't refresh your recollection that Mr. Driesman was in fact at Kelly, Andrews in 1968.

MR. SEGAL: I am going to object to this. It started on an irrelevant tack and now we are compounding it.

THE COURT: I am going to overrule it. I don't see the relevance of it, either, frankly, but if the witness can answer the question, fine.

A What I said to you was that I had no dealings with Mr. Driesman and to my knowledge he was not involved in the operation of Kelly, Andrews & Bradley. I think he may have been a principal in it from the inception. This is possible.

Again, I'm not sure of that. But as far as dealings were concerned, audit questions were concerned, in my work I never dealt with him.

MR. FEFFER: Thank you very much.

No further questions.

THE COURT: Anything else?

MR. BLOCK: No, sir.

MR. SEGAL: No, sir.

MR. ROBSON: No, sir.

THE COURT: Thank you very much. You are excused.

by the defendant Deutsch, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SEGAL:

Q Mr. Mayer, how are you employed?

A I am the principal of Mayer & Schweitzer, an over-the-counter market-making firm.

Q How long have you been a principal of that firm?

A Since its existence, in 1969.

Q Do you perform any particular function as a principal in that firm?

A I am an over-the-counter trader and market-maker.

Q Can you explain to us your education, please?

A I graduated from the University of Pennsylvania with a bachelor of science in economics, Wharton School of Finance and Commerce.

Q Have you participated in any committee or have you belonged to any organization relating to the stock market or the over-the-counter trade?

A I am on the National Association of Securities Dealers over-the-counter traders examination committee.

Q Can you explain to us briefly what that committee is?

A That is a committee that was established by the

industry to create an exmination directly related to qualifications of over-the-counter traders.

Q How many members of the Street are on that committee?

A Four.

Q Are you a member of any other committees?

A Yes --

MR. FEFFER: Your Honor, may I just inquire what Mr. Mayer is reading from?

MR. SEGAL: Mr. Mayer is reading from --

THE COURT: No, let Mr. Mayer tell us.

THE WITNESS: I have a list of organizations written in pencil on this piece of paper.

Q Are those organizations which indicate your membership, and in different committees?

A Yes.

Q Did I ask you to jot those down for your own purposes in order to --

A Just to refer to them, yes.

Q Very well.

Can you tell us what other committees you are a member of?

A I am on the District 12 Business Conduct Committee, which is the -- District 12 is the New York

Metropolitan area, of the National Association of Securities Dealers.

Q Can you tell us what the work of that committee is?

A That committee is to hear industry complaints relating to other traders or dealers in securities, as members of the National Association of Securities Dealers.

Q What kind of complaints are these?

A Trade practice complaints.

Q Are there any other committees or organizations of which you are a member?

A Yes. I am on the National Association of Securities Dealers automatic quotation rules committee. NASDEK rules committee.

Q Can you explain to us what the work of that committee is?

A That committee determines the rules and regulations as applied to the automatic quotation system, known as NASDEK, which is a trading tool, a quoting device and a trading tool used in the over-the-counter market.

Q How long have you been a member of that committee?

A Approximately one year.

Q How many members are on that committee?

A There are approximately twelve.

Q I neglected to ask you about the size of the membership of the District 12 committee.

A I don't know the answer to that because it's a rotation of people in the industry that are qualified to hear these complaints. I don't know.

Q How long have you been a member of this committee?

A About three months.

Q Are you a member of any other committee?

A I am also a member of the Rules and Regulations Committee of the Securities Traders Association of New York, which is a voluntary trading organization made up of over-the-counter traders.

Q Can you explain to us briefly what the work of that committee is?

A That committee is a committee that disseminates changes in the rules and regulations to the membership and also initiates changes which we think the industry -- may be desirable for the industry.

Q You spoke about the NASD, the National Association of Securities Dealers.

Can you tell us briefly what that organization is, what its function is?

A That is an association of securities dealers with a self-policing organization, association.

Q Is it the official organization of the over-the-counter trade?

A It's an official organization put into existence by the Maloney Act, which I think is a federal act.

Q Does it have its general equivalent anywhere in connection with -- that is, as to the over-the-counter firms, as it would be analogized to firms which deal in listed stocks?

A Well, both -- the National Association of Securities Dealers has both listed firms, if that is what you are referring to --

Q Yes.

A Members of the Exchange and non-members. It polices both types of firms and it relates to the over-the-counter market.

Q So any trading in the over-the-counter market falls within the jurisdiction of the NASD, is that it?

A Yes.

Q Your firm, could you explain to us just briefly what the size of your firm is?

A I would say that Mayer & Schweitzer is a major factor in the over-the-counter market-making.

Q Could you indicate to us what its relationship might be to other similar firms in the industry?

A I'm not quite sure I know what you mean.

Q In terms of size or ranking in the industry.

A I don't honestly know that I could give you a ranking. The best way is the way I expressed it: It's a major factor.

Whether we are sixth, fifth or ninth, I really couldn't say.

Q How long have you, yourself, been a trader?

A For fifteen years.

Q Can you explain to us or give us the definition of a trader?

A A trader is a person who is generally employed by a market-making firm, a firm that makes markets, and his function is to buy and sell either a security or a list of securities. He stands prepared at all times to make a quotation and buy and sell on a continuous basis that security or a list of securities.

Q Can you explain to us what an over-the-counter market-maker is?

A Well, basically, they are sort of synonomous in the sense that a market-maker hires, employs traders, and the trader's function, as I described, is to, on a

continuing basis be prepared to buy and sell a particular security or a group of securities, and the market-maker and trader, in that sense, is synonomous.

Q In terms of the function of a market-maker, can you explain to us just what the general theory is, or what the general approach is of the market-maker in the over-the-counter market, in terms of doing business? What does he look for? What kind of a function does he see his role as filling? What, in effect, is the way he does business?

A Well, a market-maker, as I said, his function and he performs the function of buying and selling securities. He acts as a middle-man between the buyer and the seller, and he hopes to -- he is in business to make a profit, and he hopes to do that by buying it cheaper than he sells it, and selling it at a higher price than he buys it.

Q In terms of buying it cheap and selling it at a higher price, that would be the traditional way of making money, isn't it?

A That is a profit motive, yes.

Q Is there some other approach in terms of buying it cheap? Could you just explain more, if you can, on how this theory of buing cheap and selling at a higher price works out in actual practice?

A You want me to explain the mechanics of what a market- maker does?

Q Mechanics in terms of how many shares of stock you would handle in one situation as opposed to another?

A First, market makers are generally connected by telephone or other forms of communication with most other brokers in the country.

For example, my firm has direct telephone connections to probably 150 or 175 firms in the New York metropolitan area. We are also connected either by hot line or teletype to other brokerage firms throughout the country. And these firms know that we have a reputation and we advertise through something called the pink sheets, which is a listing of all the active over-the-counter securities and now currently through NASDEK that I referred to before, which is an electronic device which flashes all over the country the current bids and asked that a market maker makes.

Through this advertising and the reputation that developed over the years, when firms with an order to buy or sell or quote a particular security, when they receive a request or an order, they would then call a market maker such as myself, my firm or any of the other competing firms that compete in this area.

Q In therms of this profit motive, which of course is at the base of the market --

MR. FEFFER: Your Honor, I am going to object to

this at this point as to the leading.

THE COURT: Well, he still hasn't gotten to the subject at hand. I am going to permit him to lead a little bit more. It is background and I suggest when the background ends and the hard core of the testimony begins, you will be in order. You may proceed, Mr. Segal.

MR. SEGAL: Thank you, your HOnor.

Q In terms of the profit motive, is it true that this would mean buying a stock which is a strong stock and waiting for it to appreciate in value?

A That may be one method that a market maker uses to secure profits.

Q Is there another method?

A Well, besides taking a position either long or short, which means either owning it or selling something that you don't own, in case of a short, many market makers simply try to balance out their positions on a daily basis by buying and selling an equal amount each day.

Q Is there ever an instance where a stock is strong and someone will short a stock in anticipation of its decline?

A Yes, that happens.

Q Can you explain to us the mechanics of that?

A Well, selling short is the process of selling a

security which you don't own, on the hopes that you will profit by it going lower. You have the ability to sell something you don't own in the securities business because all the stock certificates are identical in nature, and you have the ability to borrow someone else's securities to deliver them in the interim, until you have covered or bought back that position you have sold which you don't own.

Q Would there ever be an instance where you would buy a stock which is very strong in which you have no confidence, and you would sell that short?

MR. FEFFER: Your Honor, I am going to object to this. I think Mr. Segal has reached the point we were referring to.

THE COURT: Let's see if you can rephrase that then from this point out I will ask you to ask questions in the formal context.

Q Can you, Mr. Mayer, explain to us in more detail the alternate methods by which a market maker tries to make a profit in the Street of the over-the-counter market?

A The basic function or the basic method he uses is to either buy a security and then sell it higher, in the case of a long position, or sell it first, in the case of a short position, hoping that the stock will go down. Many times a stock ahs a sudden or a quick or a move upward, in the case

short position, where a market maker might feel that the stock is overpriced or high enough and things that accelerate at that price and buy it back in later at a lower price and vice-versa.

The stock might have a sudden drop, the market maker might say because of the drop the stock is in his mind cheap, and he thinks he can make a profit by the rise back up in the interim.

Q I would ask you at this point to assume that there was a float, and will you just explain to us for a moment what a float is? Then I will continue on with the question.

A the term "float" refers to the amount of securities that are available for purchase or sale at any given moment in time; or over a short period of time.

Q Assume there is a float of 110,000 shares in a given stock, and an order for 5 to 10 or 20,000 shares comes in. Can you explain to us what would be the practice for a non-market maker who receives such an order?

A I think before I answer that I might have to ask you, what was the nature of the order? A market order, -- is there any specific --

THE COURT: Are there different types of orders which come in?

THE WITNESS: Yes, sir.

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THE COURT: If so, would you just tell us briefly what the different types of orders that you receive are?

THE WITNESS: There is an order designated a limited order. A limited order means that the buyer or the seller puts a specific limit or a specific price at which he wants that order determined. An order to buy 1,000 shares at 40 means buy 1,000 shares at 40 or better, not any higher than 40, if you can do better than 40, fine. That would be a limited order.

A market order would be buy at the best immediate market, regardless of the price, which means that in a stock thathas a large float, large number of securities available, it could be bought at the given market. If the stock had a smaller float and a thinner supply, then a market order might dirve the price up, a sell order might drive the price down.

There are discretionary orders without any price limit on them, which would mean that the person executing the order uses his own discretion as to what price and when he executes that order.

There are other orders, I think maybe they might be more technical, like stop limit orders, where when a stock passes through a specific price it becomes a market order, which means when it hits that price, then sell it or buy it at the best immediate market. I think beyond that we are probably getting into more technical areas then necessary

Q Is there such an order as market not held?

A Yes. A market not held order means buy the stock at the best market available, but the person giving the order says "not held," he is giving discretion to the person executing the order to use his best judgment in executing it.

In other words, if it's a buy order, although he is saying buy at the best available market at the moment, he is also saying if you think that by holding back you might buy it cheaper, then you have that discretion and you won't be held, as opposed to not saying not held -- for example, if he said buy 100 shares at 40, and the stock was offered at 40 or lower, then he would be held responsible for not executing that order.

If the order was buy 100 at 40 not held, then he is giving discretion to the person executing the order, which means that he may hold off for a lower price if he thinks it is appropriate.

Q Would a not held order enable --

MR. FEFFER: Objection, your Honor, to the leading, obviously.

THE COURT: All right. Let's start again.

Q Can you tell us what if anything a trader mi in a not held order with regard to buying at a highe

MR. FEFFER: Objection, your Honor. Ca

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speculation.

THE COURT: Yes, I do think so here, although I consider that the witness has had considerable experience, I don't see it in the context. Present case, that is. This question.

I am going to sustain the objection.

Q In a not held order does a buyer have the discretion to buy it at a higher price than the quote?

MR. FEFFER: Your Honor, objection to leading.

THE COURT: It's been answered once. I heard it, but I will let the witness answer it.

THE WITNESS: Would you just repeat that please?

(Question read back by the reporter.)

A Is there a limit or is that a market order?

Q It's a limit.

A If it is a limit, then the limit stands.

Q If it doesn't have it, it is a market order?

A If it is a market order, it is at the discretion of the person executing theorder, whether to pay the current market, whatever that might be, or because he is saying "not held" he has the discretion to hold off if he thinks he can buy it cheaper.

Q Does he have the discretion to buy at a higher price?

A A market order?

Q Yes.

A Yes.

Q Assume there is a float of 110,000 shares, a market order, at 40, we will say --

THE COURT: Is that a market order or a limited order?

MR. SEGAL: I'm sorry, a limited order.

Q Assume you have a float of 110,000 shares and you have a market order for 10,000 shares, can you tell us what would be the practice for a non-market maker placing such an order with the market maker? This is assuming that a non-market maker has obtained that order in the first place.

THE COURT: Incidentally, why don't you tell us what the practice was in the spring of 1969.

MR. SEGAL: Yes.

A Okay. In 1969, in the context of that time, anyone having an order of a substantial size -- did you say 10,000 shares?

Q Yes.

A -- in a stock with a 110,000 share float, it would seem to me that the prudent --

MR. FEFFER: Objection to the "seem to me." Either we get the practice that existed or not.

THE COURT: Was there a practice, and if so, tell us exactly what it was. I don't want you to speculate.

MR. FEFFER: Are we talking of Mayer & Schweitzer's practice or general practice in the industry?

THE COURT: Why don't we leave that for the moment. You may cover that later.

A I would say the general practice in executing an order, a substantial order in a stock with a thin float, would be to leave it, all or part of it, with a market maker.

Q When you say leave all or part of it with a market maker, what then would be the discretion given to the market maker with that kind of an order, what would he do having received that order from a non-market maker?

MR. FEFFER: What type of order, your Honor? Limited order --

MR. SEGAL: A market order, all right.

A The market maker would then go out and try his best to locate stock to fill the order, which would mean contacting other brokers and dealers who may have an interest in it, who that market maker knows may have had an interest in it from time to time and reflects bids in that stock.

Q Is there any period of time within which this could be accomplished?

A I would say it all depends on the market itself, on the security and the instructions given to the market maker.

Q If there is no time limit and a market order is given, can you tell us how long the market maker is able to execute on the order he has received?

A Are we talking about a not-held order?

Q Yes.

A Then there is no answer. As long as it takes to fulfill that order.

Q In terms of the market maker who is purchasing this tock, can you tell uswhat his consideration would be in terms of the price that he charges to the non-market maker who has given him the order?

MR. FEFFER: Same objection,your Honor, leading questions.

THE COURT: Yes, I think we are getting into the

area that you should be more cautious and I will sustain the objection to form.

Q Can you state, Mr. Mayer, what the considerations are in terms of price which are given to this order by the market maker?

A Well, the market maker is attempting to maximize his profits. By the same token, he has an obligation to his customer who left him an order to execute -- give him prices that are reasonably related to the market.

Now, in a normal market making situation a market maker makes a bid and asked and the difference between the bid and the asked is the spread and that is his profit, the market maker's gross profit.

In a situation where a market maker is given an order to work against, he usualy works for a smaller profit than the spread because his risks are reduced.

Q Will you explain that, please?

A In a normal market making function, when a market maker buys 500 shares of a stock, he does know -- at 20, for example -- does know whether he will sell the stock higher than 20 and make a profit or he will sell it lower than 20 and have a loss. In other words, he is at risk, in his position, of 500 shares.

When a market maker buys stock against an order,

such as the one you suggested, then he has no risk because he is buying it at a price lower than he knows he can sell it and he is prepared to work with less of a margin of profit because there is less risk.

Q Can you tell us what possible profit could be realized if a market maker sold short against an order --

THE COURT: Sustained.

Q Can you tell us what your spread would be if you were selling short as a market maker.

MR. FEFFER: Same objection, your Honor.

THE COURT: Sustained.

MR. SEGAL: What is the objection, your Honor?

MR. FEFFER: Leading.

MR. SEGAL: How else can I ask the question? This is a simple question and I don't see I am leading anything.

MR. FEFFER: FOr six weeks I was told to ask proper questions --

THE COURT: PLease, no comments. Try to rephrase it.

Q Can you tell us what the practice is with regard to selling short on an order of the type I have indicated?

THE COURT: Or at least what the practice was in 1969 or 1970?

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A I am not quite sure I understand what your question is. Did a market maker sell short?

Q Assume that a market maker sold short to fill a position, to fill an order, can you tell us what would be the theory or what kind of a profit could that individual expect to be making?

MR. FEFFER: Objection, your Honor

THE COURT: If he knows. I find it a very difficult question to understand, but perhaps the witness can answer it.

A Are you asking me if a market maker sells --

THE COURT: You don't understand the question?

THE WITNESS: No, I'm not sure I understand it.

THE COURT: We will have Mr. Segal try to ask another one perhaps to clear it up.

Q Will you indicate to us what the spread would be if you were a market maker and decided to fill the order by selling short?

A Well, if a market maker is going to sell a stock short, then he is taking the risk, ans I explained, if he bought 400 shares at 10, he is taking a risk and he has to be certain in his mind or has to believe at the time that he can sell that long position at a profit. If he is going to sell a stock short, then he also is going to look for a

rate of profit motive because he is taking the risk of selling a stock that is thin, a small float, doesn't have many shares around, which means it is not actively traded. If he is doing that, then he is taking a large amount of risk.

Q Will you tell us why he is taking a risk? What is hedoing in that instance?

A Well, if the stock is rising and you're selling short into a rising stock there is always the possibility of the stock continuing to go up, in which case you will have to buy the stock that you sold back at a higher price than you sold it and lose money. So that the difference between buying long for your own position or selling short for your own position is that you're taking risk and, therefore, the rewards have to be commensurate with the risk, the profit has to be commensurate with the risk, as opposed to buying or selling against an order where there is a built-in profit.

THE COURT: Are you saying that the profit varies with the amount of the risk taken?

THE WITNESS: Yes [illegible] interest rates, for [illegible] or any other economic function --

THE COURT: You're saying the greater the risk the greater the profit to be expected?

THE WITNESS: The greater the [illegible]ted profit, yes, sir.

Q Does a short sale indicate that the market maker is counting on a drop in price?

A Carry on drop?

Q Counting on.

A Yes. I wouldn't sell something short if I didn't think I could cover it at a lower price, which would mean themarket is going to go up.

Q Would you tell us why a person wanting to buy a stock would leave a market order not held against a simple market order?

A Well, first of all, he feels --

MR.FEFFER: Objection, your Honor, I think now we are talking about what someone feels and I don't believe that is the specialization of the trader.

THE COURT: Well, if he can answer it, I will let him answer it. I think you have a point, but I will let him answer it and we will leave it to the jury to determine the weight they want to give to the answer.

THE WITNESS: Could someone repeat the question?

(Question read back by the reporter.)

A Well, I would have to assume that anybody--

MR. FEFFER: Objection, your Honor.

THE COURT: Yes. If you have to assume --

A Anybody leaving a market order, a substantial order in a thinly traded stock, would have to know that a simple, straight market order would probably drive the price of the stock up sharply, because a market order says, "Buy it at the best," and with each successive purchase in a thin stock, the stock would probably go higher, definitely go higher.

THE COURT: Are you familiar with the expression, "chasing the market"?

THE WITNESS: I would say that expression applies here. Thinly traded stock, the person executing the order would be chasing the stock up. Also, the person giving a market not-held order feels that the person he is giving it to has enough market savvy and expression that he could do the proper job in executing at the best price, and you are giving him the discretion of picking the spots that he thinks the stock should be bought at.

That may be at a higher level, if it is a market order, and it may be by stepping back and not executing immediately he could buy it at lower prices for the customer.

Q In terms of maintaining an orderly market, would you be able to effect a more orderly market more nearly by

placing market orders or market orders not held?

MR. FEFFER: Objection, your Honor.

THE COURT: It is leading.

In this area, I am going to let him ask that question. Go ahead.

A Please reread it.

THE COURT: Mr. Reporter.

(Question read.)

A I would say market orders not held.

Q Will you explain to us what the term you have in stock in hand would would mean in the Street?

A Normally, that is an expression where someone with an order leaves the order with a market-maker.

In other words, if someone had a thousand shares of ABC for sale, and he offered a thousand shares to the market maker, the market maker could say, "Could I have it in hand, please?" which means he wants the order, to work on it and show it to someone else.

The reverse is also true. A market-maker can say to someone when he wants to reflect an offering for bid in the stock -- he may say to a potential buyer of a stock, "I have two thousand shares for sale," and the contra-party would say, "Can I have it in hand firm?" which means he has those number of shares at that price for

a specified period of time.

Usually you say, "Can I have it firm for an hour, for a call, for five minutes?" That means you have left the offering or bid firm with the other party so he can offer it out to someone else at a better price and execute a transaction.

Q If a company like Jaffee & Company --

THE COURT: Are you familiar with Jaffee & Company?

THE WITNESS: Yes, sir.

Q Do you know Jaffee & Company? Did you know when they were on the street? Did you know the firm?

A I know the firm, yes, sir.

Q If Jaffee & Company -- and we are talking about 1969 -- were to reflect to the Street generally an interest in large blocks of a given stock, what effect, if any -- and I am talking about 1969 -- would that interest have had on the price of that stock?

MR. FEFFER: I object to that, your Honor.

THE COURT: Sustained.

Q Did you know what Jaffee's reputation was in the field in 1969?

A Jaffee & Company had a reputation of stocks which they recommended which performed or had sharply rising

markets.

In other words, the stocks that they were involved in had sharp fluctuations upward. I am talking about now in the period of 1969.

Q Can you tell us what the practice would be for a non-market-maker who wanted to make a trade without disclosing that he has a large purchase order?

A Will you repeat that, please?

THE COURT: Mr. Reporter.

(Question read.)

A He would leave that with a market-maker -- one market-maker, usually -- so that the rest of the market-making community was not aware of a large buy order.

Q If the market community was aware of a large buy order, can you tell us, from your own experience, what effect that might have on the price?

A It would drive the price of the stock up sharply.

Q When market-makers talk in terms of reflecting to each other, can you explain to us what that term means?

A Well, when somebody has an interest in a particular security or securities, he would go to a market-maker, or all the market-makers, and indicate to them that they show or reflect any orders they have in that security, either buy or sell orders, depending -- or

both -- depending upon which interest that person had in the security.

Q Have you, in the course of your business, had occasion to deal with purchases of stocks by investment funds?

A Did I?

Q Have you, yes.

A Yes.

Q Can you explain to us what indicia there are that go into dealing with the fund, what kinds of relationships of necessity arise as a result of dealing with investment funds?

A Well, it is a very personalized type of a business and a great deal of trading and orders that are executed because of a comfort that one party has with the other. It is a business of trust.

Thousands, millions of dollars worth of securities are bought and sold on a daily basis over a telephone. So that both the buyer and the seller have to have confidence and knowledge of each other to know that when the phone is hung up, there is really a trade consummated, and if the stock happens to go up and down the opposite way of the trade, that someone doesn't forget the trade.

In dealing with funds, which generally means you

are trading in larger quantities of securities, there is an even stronger relationship in terms of trust and knowledge of each other that is necessary.

I don't know if that answers the question.

MR. SEGAL: I have no further questions, your Honor.

THE COURT: Thank you, Mr. Segal.

Mr. Feffer.

CROSS-EXAMINATION

BY MR. FEFFER:

Q Mr. Mayer, you made a reference to a number of different types of orders, and I would like to ask you to define as simply as you can what a market order NH would mean.

THE COURT: Let's check the NH first.

Q Not held.

A Market order not held -- well, the first part of the order would mean the buy or sell at the best available price at a given moment. The not-held part of it then gives the discretion to the party executing the order to use his discretion and not either rush out to buy or rush out to sell, if he feels in his discretion that a better execution could be had by waiting.

Q How about that individual who has executed the

order, if he waits, what is his obligation at that point?

A He has no obligation.

Q Can he make the purchases at the higher prices?

A On a market order, yes.

MR. SEGAL: This is a market order not held?

THE WITNESS: Market order not held.

A The discretion is solely up to the person executing the order.

Q You were asked a series of questions on short selling.

What if the market-maker knows at the time of the execution of a short sale that there are other people who want to sell at that time?

MR. SEGAL: Objection, your Honor.

THE COURT: I don't quite understand the question.

Q If there are other sellers in the market at the time when he is selling short.

THE COURT: There is an objection.

If you understand the question, which I don't, frankly, you may answer it.

A Well, it would be to his advantage.

Q To go short; is that correct?

A If he thought he could cover it at a lower price and if he knew there were sellers, then I think what

Q Would it be a normal practice for the person placing the order to tell you where to go to pick up stock? Tell you the price that you could get it at?

A It would depend upon whether that person had a continuing interest or not.

In other words, if a person had a continuing interest in the stock, that person would know or might know better than the market-maker, even, where stock could be located or where there might be buyers, if we were talking about the other side.

Q So you would get suggestions oftentimes from people placing orders, is that correct, as to where to go to pick up the stock?

A Yes.

Q Would these people, when they telephone you to place an order, tell you that you were going to buy stock at a certain price and demand you to do so?

MR. SEGAL: Objection.

THE COURT: Sustained, to the form of the question.

Q Would these people who call you to place orders for stock, would they tell you the price that you had to buy at to fill that order?

MR. SEGAL: Objection.

THE COURT: Overruled.

A Well, I like to consider myself a market-maker, an independent individual, so no one tells me what to do. I do as I see fit.

Q In other words, making a market is an independent thing as you look at it, right?

A Yes.

Q It's a free market, you look at it?

A Yes.

Q You talked about the idea of personalized trust between a financial institution like a mutual fund and,I take it, its broker or registered representative; is that correct?

A Well, I'm not sure. I was expressing it in terms of the way I thought the question was phrased to me, what would my relationship as a market-maker be with that fund, but I guess -- not I guess -- it's true that that same relationship would apply if he did not go directly to a market-maker but went to some intermediary broker to execute the order.

Q Such as Jaffee & Company?

A Such as Jaffee & Company.

Q Would you tell the Court and jury why it is so important that this element of trust exist between the

financial institution and its broker?

A As I stated earlier, you are dealing in large sums of money and the transactions are verbal in nature until they are confirmed in writing. So that if there was no trust or ethics or morals between the person buying and the person selling, then at either person's whim, when it suits them financially, they could disavow the transaction, for one thing, or there could be a discrepancy over the price of the transaction or the number of shares.

MR.FEFFER: I have no further questions, your Honor.

MR. BLOCK: No questions.

MR. ROBSON: I have a few, if your Honor please.

CROSS-EXAMINATION

BY MR. ROBSON:

Q Mr. Mayer, assume a firm which is not a market-maker has a large order from a mutual fund, let's assume for the moment an order of 20,000 shares, or 10,000 to 20,000 shares. Let's assume first the receipt of a limited order; okay?

A Yes, sir.

Q Let's assume also that the firm, the non-market-making firm, has a reputation similar to the reputation

which Jaffee & Company had, of being involved with stocks that had a tendency to rise in price; okay?

A Yes.

Q Would you tell us the various possible ways that that firm with an order at a limit price could proceed to fill that order?

A Okay.

Just because of the length of the question, could I just hear it once more?

THE COURT: Yes.

Do you want to repeat it?

(Record read.)

MR. FEFFER: Objection, your Honor.

THE COURT: Yes, I think we had better have the question rephrased.

MR. ROBSON: You mean nobody understands that question?

THE COURT: I don't, anyway. Perhaps the witness does, but I am going to ask you to rephrase it.

Q Let me give you an assumption, a hypothetical assumption:

A non-market-maker like Jaffee & Company, with a reputation for being involved with stocks that move up, receives a limit order at a price of $34 a share from

a mutual fund for approximately 20,000 shares of stock; okay?

A Yes.

Q What are the possible ways in which that order could be filled by that non-market-maker?

A Could you give me specific prices? That would help me to answer.

In other words, what is the market at the time? What is the limit on the order? If you want me to make it hypothetical, I will.

Q I give you a limit of 34.

A What is the market at the time?

Q Can you answer that question without knowing what the market is?

A Okay.

Q If necessary, assume different market conditions.

A Okay.

Assuming the market, that no stock was offered at 34 or better, then there is really nothing he could do with the order except give it to a market-maker or sit on it, do nothing with it because it's got a limited price, and the limit under the market, so that a limited order at 34 with the stock offered at 34 -- if the market were 36 or 38 or 40, nothing could be done in the way of an

execution, possibly other than to show somebody with a large position, a bid under the market. That would be the only thing you could do there.

If the situation were that the limit were at or above the market --

Q Bu that you mean if stock was being offered at 34 or lower?

A Or lower, right.

Then it would depend upon the particular security. In other words, if you had a stock like American Express, for example, which has millions of shares outstanding and a large float and large blocks can be bought or sold, the order would be executed immediately at the market.

Q Add one more assumption: It has a small float of 100,000, 150,000 shares.

A If you had a small float, then the stock would have to be left with somebody who had the ability to accumulate the stock over a period of time so that the market would not be disturbed. By "disturbed," I mean if a substantial bid of 10 or 20 thousand shares, as you suggested, were shown in a thin stock to all the market makers, the stock would probably be run up.

I think you used the phrase, "chasing after the

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would be to leave that order with a market-maker, or indicate, if not leave it firm, then indicate to that market-maker that "I am a buyer or seller of X number of shares of stock and work on it for me, or reflect to me any offerings or bids that you have," depending on whether you are a buyer or seller.

Q With a market order not held, the broker who receives that order has the authority, doesn't he, to go out immediately and buy the entire 20,000 shares at any price he can get, does he not?

A Yes.

Q Or he has the authority to wait and buy it in small blocks through an over-the-counter house --

A Any way he sees fit.

Q Including paying a little bit more for it or a little bit less over a period of time; is that correct?

A Yes, that's correct.

Q Or he could give it to a firm like yours and say, "You get it for us at the best possible price"?

A Which means that he is moving the discretion into me, yes.

Q Is it not a common practice for firms like Jaffee & Company, which are known to be connected with

Q Let me rephrase it this way;

Was it not a practice, where a firm like Jaffee & Company wanted to conceal its buying interest in a stock to refer a seller of a stock that had inquired of it, to an over-the-counter house with which it had a relationship?

A Yes. I understand what you're saying. Rather than avoid buying it temselves and opening up their interest to the seller.

Q Right. Would not the practice have been to refer that seller to an over-the-counter house with which they had a relationship and advise the over-the-counter house that they were willing to buy it and request the over-the-counter house to act as a middle man in the transaction without revealing that they were the buyers?

A Yes.

Q You were asked a question on cross examination by Mr. Feffer about a short sale situation in which the short seller was aware of other persons interested in selling the stock at a lower price than he was able to sell the stock, is that correct?

A Yes.

Q And you said, I think, that that would be a good situation to be in; do you remember that?

A Yes.

Q Now, when a seller of stock advises somebody who isplanning to sell short of an offer to sell at a particular price, for how long is that offer to sell good, and can it be relied on?

A It would depend on how it was expressed. If he left an open order which would mean he left an order saying sell "X" number of shares at a price, then that was good until cancelled. In other words, there are different type of orders, which I guess I failed to go into earlier. There is something called a good until cancelled order, which means he had the firm in his hand, good until cancelled, offering the stock at a particular price.

There is something called "indicationgs" which is not an order at all, but simply an indication, keep me in mind, when the stock gets to 12, I will be a seller. That's less reliable, obviously, because there is no commitment on anyone's part. Give me a call when it gets there type of relationship.

There is something called a good day order, which means sell 12 for the remainder of the day. There are good week orders, which obviously means the order is good the week, and good the month, which is good the balance of the month.

There are also orders left for half an hour, or ten minutes.

to that non-market maker seeking to fill that order, between the price that he would obtain by leaving it for filling over a period of time with one firm, like yours, and the price he would obtain if you just communicated with a single over-the-counter firm or more than one over-the-counter firm and requested a purchase of a given number of shares.

A Generally speaking, if the balance of the market makers were aware that there was a large buying order, this would tend to make the stock rise, because the expectation of the rising would be greater than the market maker would be prepared himself to bid up for that security.

Q Aside from that effect, let's assume the market is 38-41, that is, 38 bid, 41 offered. What would be the difference in the price that would be given to that non-market maker by a firm to whom the entire order was given and a firm who is just told for purchasing of number of shares.

MR. FEFFER: Objection, your Honor.

THE COURT: Sustained.

Q Was there a practice in 1969 with repsect to the pricing of a sell in the situation that I have described for you ?

A In any circumstance when someone with an order goes into a market maker, the likelihood of his paying either the asked price, the offering price or something closer

to that, is what is actually going to occur. If an order is left with a market maker, then it is presumed that the market maker is going to buy the stock on the bid side of the market rather than the asked side, which would mean that -- and if he had a relationship where he was working with the broker leaving him the order, then the broker would, assuming the stock remains the same and don't move up or down in the interim, then he'd be working on a smaller profit margin, he'd be buying it -- the ultimate buy should end up with a lower price paid for the stock.

Q In other words, the lower price would come by dealing with one over-the-counter house on a regular basis?

A On the basis that it would be bought on the bid side of the market rather than paying the asked side because of the factor of risk again. The market that you gave I thinkwas 38 - 41. If a market maker can buy stock at 38 or 38-1/2 and turn it over at half a point of 39 against a firm order, he is taking no risk and he is prepared to work for $50, $100. If on the other hand someone comes in without any relationship and says I want to buy 500, 1,000 or 10,000, then the buyer is going to pay 41 or higher for the stock because now the market maker is in a risk position.

MR. ROBSON: I have no further questions, your Honor.

Q And the reply would be?

A Hopefully, yes.

Q Would it be, you got 2,000 at 40?

A The reply could be, you have 2,000 in hand at 40, oryou have them, or any abbreviation, you got 'em, you know. We are talking about 3, 4, 5, 6 short, curt type of replies, yes.

Q Would there be a call back after that?

A Yes, because one party, the party being offered the stock is either going to buy it, make a counter bid, a counter offer, or say nothing doing or I can't help you at that price, or can I work another ten minutes, so there should be a response back.

Q If there is a response back and there is a succes-ful sale being made, what is the conversation?

A I bought 2,000 at 40.

Q That would be it?

A Well, it could be embellished, but basically that is what you're saying. I could say, do you have any more, I could use an additional -- there are a lot of things I could say, but basically I would be saying I bought them, or I sold them if there was a sell off, the other party was looking to buy.

duly sworn, testified as follows:

THE COURT: You were here before, Mr. Rothman?

THE WITNESS: Correct.

DIRECT EXAMINATION

BY MR. SEGAL:

Q Mr. Rothman, you testified here as a Government witness?

A Yes.

Q Would you explain to us just briefly again what your occupation was in 1969 and 1970?

A I was the cashier at New Dimension Securities.

Q As a cashier, would you explain to us just briefly what your duties were?

A I overseed all the back office work, which means the books and the cash and the files for the stock.

Q Are you familiar with the correspondence, the written data sent out and received by New Dimension?

A Sometimes.

Q I show you Mr. Deutsch's Exhibits W, X and Y, and ask you if you recognize these three documents.

A These three documents are on the letterhead of New Dimension Securities Corporation.

Q Do you recognize those as documents of the New Dimension Securities Corporation?

A Yes.

Q Were they kept in the offices of New Dimension Securities?

A Yes.

Q Were these retained as a business practice by New Dimension Securities?

A Yes.

MR. SEGAL: Your Honor, at this time I would offer Mr. Deutsch's Exhibits W, X and Y.

MR. BLOCK: I thought W already went in.

THE COURT: Let me check. I think that may have been Mr. Duboff's W.

The last Deutsch exhibit I have is V. So this is W, X and Y for identification.

MR. FEFFER: Is it W, X and Y that you are offering?

MR. SEGAL: Yes.

(Pause.)

MR. FEFFER: May I ask a few questions on the voir dire, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. FEFFER:

Q Referring to W, X and Y, did you prepare any of

these documents?

A No, I did not.

Q Do you know how they were prepared?

A They were typewritten -- typed, I should say.

Q Do you know whether, in fact, that these very documents were prepared in the office of New Dimension Securities? Do you know of your own knowledge that X, W and Y were prepared in the offices of New Dimension?

A I would say they were.

Q What do you mean by "I would say"?

A I didn't prepare them. Someone else did.

Q Do you know who prepared these?

A Jim Stewart.

Q Are Mr. Stewart's initials on here anywhere?

A No.

Q What is the basis of your knowledge that Stewart prepared these?

A Mr. Stewart took care of the co[illegible]d the books on the commodities, and he typed [illegible]e statements and sent them out.

Q Are you certain that Mr. Stewart actually prepared these three?

A I would say he did.

Q Who is Mr. Stewart?

A The person who handled the commodities in the office. He was the commodities trader.

Q There is a name, I believe, Harry Morginstin and William Harris, on these --

MR. SEGAL: Your Honor, we are now having material read from something not in evidence.

THE COURT: Yes.

Rephrase your question or complete your voir dire.

Q Do you know what these documents are?

A They are futures in silver bought in the commodity department.

Q Of New Dimension Securities?

A Of New Dimension Securities.

Q That would be W and X?

A Yes.

Q What is Deutsch's Y?

A This is a receipt given to Mr. Harry Morginstin for the amount of money credited to his account.

Q At New Dimension Securities?

A Yes.

MR. FEFFER: No objection.

MR. BLOCK: No objection.

THE COURT: Received.

(Deutsch's Exhibits W, X and Y for identification were received in evidence.)

THE COURT: All right, Mr. Segal.

BY MR. SEGAL:

Q Mr. Rothman, I show you Mr. Deutsch's Exhibit Z and ask you if you can identify that item.

A Yes, I can.

Q Can you tell us whether or not your handwriting appears on any portion of that document?

A Yes, it does.

MR. SEGAL: I would at this time offer Mr. Deutsch's Exhibit Z.

VOIR DIRE EXAMINATION

BY MR. FEFFER:

Q Which handwriting on the back portion of this document is yours?

A Whre it says, "Pay to the order of the Bank of New York, New Dimension Securities Corporation."

Q Whose handwriting is that in the upper portion, if you know?

A Mr. Deutsch's handwriting.

Q Do you know what the figures mean on the top?

A I would assume that was the amounts credited to the accounts of these people in the commodities.

Q In other words, the people listed on the back of this check had accounts at New Dimension Securities?

A I believe this opened up the accounts at New Dimension Securities.

MR. FEFFER: No objection.

MR. ROBSON: No objection.

THE COURT: Mr. Block?

MR. BLOCK: No objection.

THE COURT: Received.

(Defendant Deutsch's Exhibit Z for identification was received in evidence.)

MR. SEGAL: Your Honor, may I read some of these documents to the jury?

THE COURT: You may.

(Mr. Segal read to the jury from Defendant Deutsch's Exhibit W in evidence.)

(Mr. Segal read to the jury from Defendant Deutsch's Exhibits X, Y and Z in evidence.)

MR. SEGAL: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. FEFFER:

Q Mr. Rothman, I believe there are five names on the back of this check that you referred to --

THE COURT: You are referring to Z, is that right?

MR. FEFFER: I'm sorry, your Honor. Yes.

A Yes.

Q Harris,R.Duboff, H. Duboff, S. Deutsch, Morginstin; is that correct?

A Correct.

Q Are these people that, as far as you can recollect, had accounts with New Dimension Securities?

A They had accounts with the commodities department.

Q Of New Dimension Securities Corporation?

MR. BLOCK: Thank you.

MR. FEFFER: Your Honor, I'd just like to state the Government's objection to that. If Mr. Block has any precedent for putting anybody on the stand to explain to the jury --

THE COURT: He is not explaining it to the jury. This is for the Court alone.

Do you intend to put Mr. Orenstein on in the presence of the jury, Mr. Block?

MR. BLOCK: Of course.

THE COURT: If you give me precedent, fine. If you wanted to make a record here, away from the jury, with the jury in the back, I will let you make your record as to the efforts that you made to get this witness here.

But for you to put Mr. Orenstein on the stand that he had conversations with Mr. Surnow -- Mr. Block, give me --

MR. BLOCK: Not with respect to the merits of --

THE COURT: Give me one authority for this.

MR. BLOCK: Your Honor, I am taken by surprise. I don't have an authority at my finger tips.

In my view it is perfectly proper -- now wait a second. I just want to clear up any possible misunder-

standing.

The only thing that Mr. Orenstein will testify about the conversations is only that he said, "We need you in this case, Mr. Surnow," and Mr. Surnow said, "I will come," and then made it clear to Orenstein that he was kidding. That's all. It's got nothing to do with the substantive $20,000,000. It's simply and only an effort to locate a witness, a crucial witness, and get him in at this case.

THE COURT: Y. I want to make your offer of proof beyond what you have said to me by calling Mr. Orenstein, you will do it outside of the presence of the jury.

I accept your representations as made, but I have no intention of calling Mr. Orenstein to testify in this case in the presence of the jury.

MR. BLOCK: Well, I except to your Honor's ruling.

I will go ahead and put Mr. Orenstein on the stand now, but I submit I should be entitled to adduce his evidence before the jury. That is the whole point.

THE COURT: Let me hear his testimony.

S. E D W A R D O R E N S T E I N,

called as a witness by the defendant Cohen, being

first duly sworn, testified outside the presence of the jury, as follows:

THE COURT: Before we begin, I think it might be just as well to send the jury to lunch because I think we are going to be here awhile. Since it is obvious to me that Mr. Feffer and Mr. Robson cannot confer between themselves in the time which I indicated the jury would be out.

Is there anyone who objects to my sending the jury to lunch and directing them to return at 2:00 o'clock?

MR. BLOCK: No objection.

MR. ROBSON: I don't object if your Honor feels that is the best procedure, but I think it might be desirable, rather than keep everybody around for an hour and a half, if we saw where we got in the next ten or fifteen minutes. If it doesn't look like Mr. Feffer and I can get straightened out by, say, twenty of 1:00 or at least where we are so close that it will only be ten minutes --

MR. SEGAL: I would prefer, your Honor, that we have as little dead time as possible.

THE COURT: We are going to have things to do this afternoon. Under the circumstances, I will take Mr. Robson's suggestion and we will proceed.

DIRECT EXAMINATION

BY MR. BLOCK:

Q Mr. Orenstein, are you a member of the bar of the State of New York?

A I am.

Q How long have you been a member of the bar, approximately?

A Since 1953.

Q Have you been associated with me in the defense of this case, in behalf of the defendant Milton Cohen?

A I have.

Q Did there come a time, sir, when you attempted to contact a Mr. Jack Surnow?

A Yes.

Q Did you in fact contact him on the telephone?

A I did.

Q Do you recall how many times you spoke to him on the telephone?

A Two or three times.

Q What was that with reference to?

A His appearance as a witness in this case.

Q What did Mr. Surnow say to you in that series of telephone calls with respect to his willingness and ability to come here and testify as a witness?

A He indicated at first that he would be willing to come and testify. Then, during my subsequent calls, I got the distinct impression that he was stalling. And then, subsequent to that, he wouldn't take my phone calls at all.

Q Over how long a period of time was it that you were engaged in these two or three telephone conversations with Surnow?

A Approximately one week.

MR. BLOCK: Would you mark this please?

(Defendant Cohen's Exhibit SS, marked for identification.)

Q I show SS for identification and ask you if you can identify that?

A Yes.

Q What is it?

A It's a letter addressed to the United States Marshal's office in Detroit.

Q Is that a copy of a letter that you sent out from your office?

A Yes, it is.

Q I notice certain longhand writing, which seems to be telephone numbers.

A That's correct.

Q Who wrote that? Did you?

A Either I or my secretary. It's my secretary's handwriting.

MR. BLOCK: I offer SS for identification into evidence for the purpose of this hearing.

MR. FEFFER: I have no objection, your Honor, for the hearing.

THE COURT: Received.

(Defendant Cohen's Exhibit SS, received in evidence.)

Q Sir, pursuant to that letter which is in evidence you mailed out a subpoena duces tecum to the Marshal in Detroit, Michigan?

A I mailed out a subpoena duces tecum and a witness subpoena.

Q That was done air mail special delivery on Thursday, May 30th, pursuant to the date on the letter?

A That's correct.

And it was received May 31st.

Q Subsequent to the mailing of the letter, did you have a telephone conversation with anybody in the Marshal's office in Detroit, Michigan?

A Yes, I did.

Q When?

A This morning.

Q Whom did you speak to?

A Marshal Halloran.

Q Was he the deputy who was assigned to this matter?

A That's correct.

Q What did he tell you in the course of your conversation with him, very briefly?

A He told me that he attempted to effect service on Friday and that he went to Mr. Surnow's office and was told that he wasn't there. He left his number and received a call back from Mr. Surnow yesterday indicating that he was going to be out of town and would possibly be available for service on Wednesday, tomorrow. The Marshal told me he is awaiting further instructions from me as to whether or not to effect service tomorrow.

MR. BLOCK: I have no further questions.

MR. FEFFER: I don't have any questions, your Honor.

MR. ROBSON: No questions.

THE COURT: Very well. You may stand down.

MR. BLOCK: On the basis of that, your Honor, I renew my application to have this testimony adduced on Mr. Cohen's behalf in front of the jury. I think it vitally important and I think it is entirely admissible.

MR. FEFFER: Your Honor, again for the same objection, everytime a party is unable to call this witness, they could follow this procedure.

MR. BLOCK: Ridiculous. We made a genuine effort

here.

MR. FEFFER: Your Honor, it often occurs for various reasons parties cannot get hold of a witness. For example, we are going to be precluded from bringing our witness in. Can I tell the jury that because we are closing the case this afternoon, we are foreclosed from bringing in a witness? It is the same principle.

MR. BLOCK: The government had six weeks to adduce the evidence in this case, your Honor, and I think this little situation that Mr. Feffer alludes to has nothing to do with the issue involved in my effort to get this in front of the jury.

MR. FEFFER: In terms of the rebuttal case, the six weeks that Mr. Block refers to is really meaningless. This arose during the course of the testimony yesterday and this morning.

THE COURT: I will deny the application. I would suggest in view of the testimony adduced here that if you would like a charge on the matter of missing witnesses, if you present me with a request to charge on the subject, I will consider an appropriate charge on the subject of missing witnesses.

MR. BLOCK: I will have to be satisfied with that under the circumstances, your Honor. I think the charge is

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very simple, that where a witness was available to both sides, no inference can be drawn as against either side for failing to call him. And I suppose I could argue to the jury why didn't the government call Surnow to prove that there was no commitment. I'm not happy, but --

MR. FEFFER: Your Honor, I would just add this:

There have been comments made that Mr. Surnow -- I don't know if this was made yesterday or in the course of today, that Mr. Surnow was somehow avoiding service. It now appears that Mr. Surnow has been reached by telephone at his address on a number of occasions. The address was supplied by the government at your Honor's direction, so I don't think it is fair anymore to let the record stand in that regard.

Mr. Surnow has been talked to,he's been spoken to on the telephone at the address which the government supplied, so it is not a matter of a man trying to avoid process. He is there and he can be served.

MR. BLOCK: The Marshal couldn't serve him; isn't that an answer? He went there on Friday and couldn't find him.

MR. FEFFER: I suggest he might have been in his office yesterday, for example.

MR. BLOCK: I hav eno control over the Marshal. I couldn't send the Marshal out yesterday; I was busy handling

the defense of the Cohen case.

THE COURT: The Court has ruled on the matter brought up by Mr. Block. As I say, I will entertain a request to charge appropriate to the matter of missing witnesses.

Mr. Robson?

MR. ROBSON: For the record, your Honor, I would like at this time, on the basis of the testimony which we have just heard, to move to strike from the trial record all references by any witness to the 15 to 20 million dollars finance. I won't argue this in any great detail. I think you understand the basis for it. We objected to this testimony in the first place on the ground it was outside the scope of the indictment, it was never referred to. The reason we objected was not being advised early enough of the charges against us it was very difficult to prepare a defense and this is the kind of problem that arises when the defendant is forced to go to trial in a case this complex without knowing in advance precisely what it is expected to refute, rebut or defend against.

MR. SEGAL: I join in that application, your Honor.

MR. BLOCK: I do too, your Honor, in behalf of Mr. Cohen.

THE COURT: I would note, gentelmen, for the

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a witness by the Government in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHATTEN:

Q Mr. Clayton, you were a shareholder of Richard Packing Company during the years 1969 and 1970; is that correct?

MR. BLOCK: I object to the leading, if your Honor please.

THE COURT: I will permit this one question, but certainly not from this point on.

A Yes, I was.

Q I show you what has been marked as Government's Exhibit 89 for identification and I ask you, can you identify it?

A Yes. This is the envelope in which I received the annual report for Richard Packing Company for the fiscal year ending in 1969.

MR. SCHATTEN: The Government offers Government's Exhibit 89 in evidence.

THE COURT: Show it to counsel.

(Pause.)

MR. BLOCK: May I ask a question on the voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. BLOCK:

Q Mr. Clayton, I show you 89 for identification and I ask you, is that the exact envelope in which you received the 1969 annual report of Richard Packing Company?

A Yes, it is.

Q And you have maintained it all these years since you got it in 1970, is that your testimony?

A I put it in the file with all the Richard material and maintained it all the time.

Q You kept it all the time?

A Until I brought it out of the file.

MR. BLOCK: If your Honor please, I voiced my objection at the bench and your Honor has made a ruling.

THE COURT: Right.

Let me see what Mr. Segal and Mr. Robson wish to do.

VOIR DIRE EXAMINATION

BY MR. SEGAL:

Q You said that you were the owner of some stock of Richard Packing?

A I didn't understand the question.

Q Did you say that you were the owner of Richard Packing stock?

A Yes.

Q Is Antoinette your wife?

A She is.

Q Was the stock actually in her name and not your name?

MR. SCHATTEN: I object, your Honor. That is beyond the scope of voir dire.

THE COURT: Overruled.

Q Was the stock in Antoinette Clayton's name and not in Hugh B. Clayton's name?

A Some was in her name; some was in my name; some was in joint name. I believe this is with a joint name.

Q This reads Antoinette Clayton, care of Hugh Clayton.

A That's right.

Q This would indicate that the stock was in Antoinette's name rather than yours?

A That's right. Some stock.

Q Did your wife receive this or did you receive it?

A This is my business address, so I received it.

MR. SEGAL: Your Honor, I would object to this

document on the ground that this is not the witness' item, and on the other objections which have been voiced with regard to this particular document at a side bar conference.

THE COURT: Mr. Robson?

VOIR DIRE EXAMINATION

BY MR. ROBSON:

Q Mr. Clayton, was the stock which you held in Richard Packing Company or which was held by your wife in Richard Packing Company maintained in your possession or was it left at the brokerage firm from which you bought it?

A No, it was used as collateral and was held by the bank.

Q Was it transferred to the bank or just assigned to the bank?

A No, it was assigned to the bank, the bank had stock powers to cover it, but the certificates weren't put in the bank's name.

MR. ROBSON: I have the same objection as has already been raised by Mr. Block and Mr. Segal.

THE COURT: Overruled.

(Government's Exhibit No. 89 for identification was received in evidence.)

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MR. SCHATTEN: At this time I'd like to read the date on this envelope to the jury.

THE COURT: You may.

MR. SCHATTE: Government's Exhibit 89 contains the annual report that is Government's Exhibit 13A. The date on this envelope is St. Paul, July 21, 1970, Minnesota.

BY MR. SCHATTEN:

Q Mr. Clayton, when did you receive Government's Exhibit 89 and its contents?

A I believe I received it a few days after the date stamped here, which is July 21, 1970.

MR. SCHATTEN: No further questions, your Honor.

THE COURT: One moment, gentlemen.

(Pause.)

THE COURT: Would you gentlemen step to the side bar, please.

(At the side bar.)

THE COURT: I have reviewed the 3500 material and I would suggest that for completeness I will read it and show to counsel the lines immediately above the portion wich was Xeroxed. The lines read as follows:

"Calls Cohen and asks for annual report, who says that the annual report is being delayed because of difficulties with the government. This follows conversation with Deane

than the name of -- and I am talking about Richard Packing Company stock, other than stock in the name of Antoinette Clayton, care of Hugh B. Clayton, at the South Dearborne address in Chicago, isn't that correct?

A No, I didn't myself. I had some in my own name --

Q You had some in your own name?

A My wife had some in her own name.

Q So there were a number of certificates, isn't that correct?

A That's correct.

Q Were any of those certificates owned by your or your wife or jointly in Street name, that is in the name of a brokerage house?

A No, they were not.

Q Did you receive a number of copies of the annual report?

A Yes, we did.

Q I'm talking about the one for 1969.

A We received several copies.

Q You received several copies because there were different names on different certificates, isn't that right?

A Correct.

Q Did you keep any of the envelopes in connection with the other annual reports that you say you received, or

is this the only envelope you kept, number 89?

A I believe this is the only one I kept.

MR. BLOCK: No further questions.

CROSS EXAMINATION

BY MR. SEGAL:

Q Mr. Clayton, did you receive annuals earlier containing the 1969 annual report?

A No, I didn't.

Q Do you know if your wife did?

A No, she didn't.

Q Do you know that she didn't?

A I know.

Q Was there any other address used besides your office address for annual reports?

A Yes. We received some in Glenview, Illinois.

Q What was Glenview, Illinois?

A That's where we live.

Q Is that different from your office address?

A That's correct.

Q Your office is Chicago?

A Yes, sir.

Q If you had received a copy at the same time or earlier in your Chicago office and in your home, I assume you would have to say he had one of them into the basket?

MR. BLOCK: If your Honor please, at this time I would like to add orally that I think I reflect the thinking of all my colleagues that we would like your Honor to charge the usual request with respect to the failure of the defendant to take the stand. That is boiler plate. I think I left open the question of whether I joined in my colleague's request that your Honor not Marshal the evidence, and I want to make it clear that I do join in that request at this time and further, your Honor, I am not requesting your Honor to charge with respect to missing witnesses.

MR. FEFFER: Your Honor, the government would definitely request -- I don't believe it was included -- a charge that both parties, both defendants and the government, have the right to subpoena witnesses, because the government does in all probability make reference to this, if it becomes necessary.

THE COURT: Taking the two matters which Mr. Block has adverted to, first, relative to the matter of the defendants and their testimony, I intended to charge;

"The law doesn't compel a defendant in a criminal case to take the witness stand and testify and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. As stated before, the law never imposes upon a defendant in a

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Requests 1, 3, 4, 6, 9, 10, 14, 15, S-1 -- that is Supplemental Request No. 1 -- Supplemental Request No. 3 and Supplemental Request No. 4.

MR. BLOCK: If your Honor please, then I for the record respectfully except to your Honor's refusal to charge as requested.

THE COURT: Turning now to the requests of the defendant Deutsch, the following requests submitted on behalf of the defendant Deutsch are granted either in whole or in substance: 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20.

Requests 6, 21, 22 and 23 are denied.

Turning next to the requests of the defendant Duboff, the following requests are granted either in whole or in substance: 4, 5, 6, 7 and 8.

Requests 1, 2 and 3 are denied.

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those regards; not 23.

MR. BLOCK: All right.

With respect to 26, in the context of this case and particularly from the point of view of Mr. Cohen, your Honor --

MR. FEFFER: 26 is not being given, Mr. Block.

THE COURT: That was one which I indicated I would not charge.

MR. BLOCK: Fine.

I objected to 27 because we have some evidence here of lack of reliance, and it seems to me that if we are engaged in a fraud case, that reliance is an integral part of a fraud situation.

THE COURT: I submit that it is not.

MR. BLOCK: Very well, if that is your Honor's view, all I can do is except.

THE COURT: You have. We discussed this matter of reliance at an earlier juncture.

MR. BLOCK: Your Honor is planning to charge 35, which is the definition of an underwriter.

THE COURT: Yes, I was.

MR. BLOCK: If your Honor please, it seems to me that in the context of this case, I would submit that the testimony with respect -- the conflicting testimony

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here with respect to what constitutes an underwriting -- remember, we had Mrs. Appleton here, and Mrs. Appleton testified to the difference of opinions among lawyers -- it seems to me, your Honor, that the question of what is an underwriter in this case is essentially a factual issue, in the light of this particular case. And the Government's adducing the testimony of Mrs. Appleton, she is cross-examined, and I'm sure your Honor has her testimony in mind, and it seems to me it's a factual issue, and I don't think it is fair, in the context of this case, to charge the jury as a matter of law as the Government would have you do.

I have discussed this with my co-counsel and I think that they are in accord with that view.

THE COURT: Incidentally, so you have it in context, I plan to follow 35 with your Requests 12 and 13, in substance. Just so you have the context of it.

MR. BLOCK: Of course 13 deals with Cohen's shares. That doesn't have anything to do with the underwriting.

THE COURT: I just want you to know the context of it.

MR. BLOCK: I appreciate that. I appreciate your Honor's charging 12 but it seems to me that you are

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charges do we find such things as complaints about projections on earnings, the lateness of the annual report, misstatements on a number of franchises, the situation on F & T Meats, the profit Mr. Cohen made on his own shares, some kind of blame that attaches to the approval of the Papworth report, difficulties with the franchises, according to Mr. Kally, and the $20,000,000 commitment and the deposit of $200,000 by Richard Packing in a trading account at New Dimension?

His Honor will discuss this with you in his charge, and it is very important: How many conspiracies do we have here? Assume, just for the sake of argument, that you credit everything that was said by the Government witnesses.

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Just assume that. I know you can't possibly, but just assume it. And we have got Deutsch and Duboff linked with Kelly, Andrews & Bradley; we have got Deutsch and Duboff linked with New Dimension Securities, the Reiss Bank, the whole bit. Cohen nowhere involved.

So what is the one conspiracy that Mr. Feffer is going to be talking about, because Mr. Feffer is not going to lose this case as being separate conspiracies.

This is the situation, Mr. Feffer will tell you, in which there was one overall conspiracy, and that was to cause the price of Richard Packing Company stock to rise by means of false statements. That is what he is going to tell you. But, I submit to you, that you give consideration to Mr. Cohen's very limited role in this case, and when you are trying to decide, number one, how many conspiracies there are, number two, if there was a conspiracy what was involved in the conspiracy that was the purpose of it, and, number three, was Cohen even in the conspiracy in the first place?

Let me say this: This is a case compounded by the Government out of half-truths. I said something about that in my opening statement to you. I said that when a witness gets on the witness stand, he is entitled to be cross-examined, or he has to undergo cross-examination.

statement is that it does not accord with the undisputed testimony of the witnesses in this case. And that's another thing.

In my humble opinion we are on trial in this case because these two gentlemen sitting here are pitting their business judgment as Monday morning quarterbacks against the business judgment of Milton Cohen. You are going to hear about htat, particularly in connection with the 1969 report and the testimony of Mr. Brodcorb. You know that money was advanced, they are going to tell you that this was a fine way to run the Circus Wagon franchise because there Cohen should not have put the money into Resort Products, and also there is this business of investing in the stock market, and he is going to talk a great deal about that, I'm sure, and you will see when you look at Government's Exhibit 13A in evidence that there is a listing of publicly traded securities which ties into the fact that the company invested in the stock market.

Nothing illegal about that. As a matter of fact, the charter of the company, which is part of Exhibit 5, contains a proof to look for. This is the certificate of incorporation:

"Articles of Incorporation of Richard Packing Company."

You reconcile it this way, that this letter of stockholders by April 16, 1970 took into account the conservative accounting way of counting franchises rather than the liberal way, rather than the way that Faris had been counting them.

Then the number of franchises, I think I have covered that.

F & T Meats. This showed up in the Papworth report. You remember that report. The deal with F & T Meats is supposed to take place and everybody is going to be happy and make a million dollars, and it doesn't go through.

The Government, again with a half-truth, calls in Oscar Feldhamer, inside guy, and he didn't know anything. Why didn't they call him? We had to call him.

By the way, we don't have to prove our innocence in this case. We don't have to call any witnesses. We did. It is the Government's job in this case -- that is what it means, that they have the burden of proof beyond a reasonable doubt. It is the Government's burden to call witnesses in to prove their case.

Counsel have talked about the missing witnesses? Where is the missing witness on the $20,000,000 commitment by Jack Surnow? Why isn't he here with

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(In open court; jury present.)

THE COURT: Ladies and gentlemen, we will now hear the final summation. This will be the summation on behalf of the Government, which will be presented by Mr. Feffer.

You may proceed, Mr. Feffer.

MR. FEFFER: Thank you, your Honor.

Judge Ward, Mr. Block, Mr. Segal, Mr. Robson, Miss Short, and ladies and gentlemen of the jury:

I, too, first want to thank you for your extraordinary patience during this trian, which probably ran way too long, from everybody's standpoint. Unfortunately, there are many times when you heard more from the attorneys than you did from the witness stand, and I apologize if I spoke a little too much during the course of the trial. I know today it's getting late. You have already heard something like four, four and a half hours of summations. So I am going to ask you just to remain patient for a couple of more hours, during which time I am going to sit here and try to review the evidence from Day One through the trial.

I am not going to please defense counsel when I do this, because I'm not going to draw on too many inferences, and I'm not going to ask you to reach too

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many inferences.

I sat here fairly quietly during the course of the defense summations, but I don't want you to get the impression that because I wasn't standing up objecting, saying, "Let me tell you my side of the story; that is not the way it happened," that I agreed with what defense counsel were saying, because I didn't, and I don't now. But that is a courtesy that we attorneys try to extend to each other at the end of the case, to let each speak on behalf of his client without interruption. There were many times that I wanted to, but our procedure doesn't allow for that.

What I'd most like to do is to go down the aisles and speak with you individually and ask you if you have any questions in your mind, because in that manner I would be assured that I was responding to any questions that you had. Unfortunately, our procedure again doesn't allow for that. So I am going to sit here and I am going to try to anticipate those questions which you still may have.

Defense counsel, and in particular Mr. Segal, made some rather strange accustions to the integrity of the United States Attorney's Office and my integrity. I must say that here I feel like responding, but I am not going

to, because the function of a summation, ladies and gentlemen, is to sit, stand, and review the evidence.

And Mr. Segal did very little. So I am going to try to put those accusations aside and review with you the testimony from the witness stand and some of the many hundreds of exhibits that came into evidence in this trial so you will be better able to render fair judgment in this case.

The information charges in part that untrue statements of material facts were made. Let's focus on that.

Mr. Robson in his opening remarks to you correctly stated what this crucial issue is. He said this, I think it's germane, and I think you should follow it. What is material is did they, the defendants, lie to anybody about the stock of Richard Packing, and get somebody to buy stock so these people would be defrauded, and he went on to say, "I tell you that the evidence will not establish that." Not at all. That is what that part of the case is all about. Simply telling the truth. And it's your job at this point to answer Mr. Robson's question. Did the defendants lie with respect to Richard Packing stock? And I submit, ladies and gentlemen, that whether the Securities Laws are complex is totally irrelevant to

irrelevant to whether these defendants lied. So, that Mr. Cohen relied on Mr. Malmon is totally irrelevant as to whether the press releases, for example, contained truthful information, and whether the economy turned sour and Richard Packing fell on its face is totally irrelevant.

The basic question is, did the defendant tell the truth?

Finally, the Denver Funds checked and rechecked and reviewed and reviewed Richard Packing is totally irrelevant. The question is whether these defendants told them the truth.

We don't disagree with defense counsel for one second when they stand before you and tell you that the franchising business was a risky business and that the market went sour. I believe the testimony was not as Mr. Block said -- I believe the testimony was in 1969 and 1970 there was a decline in the stock market, as Mr. O'Meara said. But that is not what this case is all about.

Mr. Hurley, Mr. O'Meara, you recall, the gentleman from Vermont, they were willing to take their chances for the future. They recognized the risk factors, no question about that. Why? Because they were impressed with it and with Jaffee & Company, the prestigious investment

banking concern that we have hears so much about. How many times did we hear that from witnesses on the stand, about how prestigious Jaffee & Company were? People were thrilled to get their business, absolutely thrilled. And what did Mr. Leonard Mayer say on that stand yesterday? He was Mr. Deutsch's witness. What did he say with respect to this? I am quoting from Page 4867, "Well, it is a very personalized type of business, and a great deal of tradings and orders that are executed bedause of the comfort that one party has with the other. It is a business of trust. In dealing with funds, which generally means you are trading in larger quantities of securities, there is even a stronger relationship in terms of trust and knowledge of each other that is necessary."

What did Mr. O'Meara say at Page 2568-69 of the transcript in regard to this element of trust?

"Q And didn't you figure or take into consideration in making the recommendation that if you had a well managed company in the franchise business with honest people, that it should do well?

"A Yes."

Ladies and gentlemen, it was no different and is no different than someone walking into a fine jewelry shop, for example, Tiffany's, and having a diamond appraised.

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When you go into a prestigious store like that, you are relying on their judgment and their honesty to tell you the real value of that diamond. And that is what Mr. Schatten said at the beginning when he said it's a simple case, because this element of the case is simple.

And most important, the defendants knew, they knew that Mr. Hurley, Mr. O'Meara and other people trusted them. Remember what Mr. Deutsch said to Mr. Perry Leff in June of 1969, when Mr. Leff complained that the Funds had sent him an agreement that didn't conform to what he thought should be proper?

"Mr. Deutsch: Don't concern yourself about that. They are not betting on the horse; they are betting on the jockey. If I choose you and selected you, that is good enough for them. I have done very, very well for the Fund and they trust my judgment."

Mr. Deutsch knew that very, very well.

Mr. Hurley, like Mr. O'Meara, trusted him implicitly. When Mr. Deutsch or Mr. Hurley -- said that Mr. Hurley should place all his orders through Jaffee & Company because Mr. Deutsch could get the shares for him at bid price plus commission, which in essence means "We will get the stock for you at the best possible price, the lowest possible price" -- but we will get back

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to that, and we will see whether the Funds were receiving shares of Richard Packing stock through Jaffee & Company at the best or lowest possible price.

And for this service of trust, and for this service of supplying the Funds with information, they paid Jaffee & Company thousands of dollars in commissions. Essentially, from this point on, the case is about the disabuse of that trust by these defendants.

Let's start looking briefly at the information that was provided by these defendants to the Funds and other people to sell stock. They started off with the Papworth report. They then went to a public relations firm in New York, Bass & Company, and press releases started flying out, and all of them ended up at the Denver mutual funds and other places.

And what did these press releases and the Papworth report say about Richard Packing Company? In essence, they painted a picture. They painted a picture of a thriving, growing company. From the first press release to the last one, they had 210 franchises. The picture that was painted was of a company that was thriving. So, ask yourselves this question -- this is what we are going to discuss: Was Richard Packing Company a flourishing fast-foods franchise company? Were the representations

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that were made to sell stock true?

Those are the questions which you must answer. Not whether Mr. Cohen had a dream or whether his judgment was good or bad. And not whether the economy had a downturn. It is Mr. Robson's question you might answer: Did these defendants lie to anybody about Richard Packing?

Let's go back to the beginning and take a closer look at this company. We know that in 1968 Richard Packing was a rather lackluster meat company making hamburger patties in Minneapolis. There were approximately 100,000 shares of the stock outstanding, which, as we have been told by many people, is not very much. And on Page 4 of the offering circular we see that the highest price for the stock for the first quarter of 1968 was approximately 4-7/8, in other words, close to $5 a share. And as we all know, this situation changed very dramatically.

Jaffee & Company becomes interested in Richard Packing, and during the summer MR. Deutsch meets Mr. Deane and tells him this: He was in the process of trying to build a franchising operation similar to McDonald's. And then what happens next? There is a meeting at a town house. The same thing. Mr. Deutsch says he was in the process of building a company substantially similar, but somewhat unique from McDonald's.

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He is going to, through acquisition, build that meat business several-fold. What is thenext thing that we hear about in the way of a meat company acquisition? You remember F&T Meat Company? Remember Oscar Feldhamer and his Brother David? It's been their allegation that we brought in Oscar Feldhamer and they brought David. But Oscar was the one who said, "No deal." Oscar was the one who had enough sense to say, "I want cash."

In late February, early March before the fund purchased one share of stock, Mr. Deutsch and Mr. Duboff went west and met with Michael Papworth who at that time was 29 years old and was a trainee at a place called ~~Lunar Sales~~ Loomis Sayles. After this meeting Mr. Papworth in his own time prepares that report. You saw that report. It's not on a letterhead of any company. It was for his own interest and to help him learn how to write reports. He was proud of the report and he sent it on to Mr. Deutsch and Mr. Cohen. And they reassured him that it was a good, solid report. Mr. Papworth had no intention nor did he give anyone authority to send this report out. This made an interesting situation. That report was sent on to Mr. Hurley at the Denver fund, without Mr. Papworth's knowledge or consent.

Let's take a look at that report. This is written in March of 1969. The third paragraph, "The company has

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recently entered into an agreement to acquire F&T Meats of New York." This is March. Now, remember the meetings with Mr. Feldhamer, in late '69. "Contacts indicate the principal of F&T Meat are experienced in the meat processing business. Mr. Cohen stated the central reason for the acquisition was F&T 's capable management." This is Hurley picking up this report sent to him by Mr.Deutsch from prestigious Jaffee & Company, and reading that report.

There is not much sense in sitting here and dwelling on the testimony of the Feldhamers, but you might just be interested in this one small portion of Oscar Feldhamer's testimony when he says, "Well, at that time I am sort of a conservative person and I didn't want to go for all stock. I wanted some money, some cash. So no agreement was entered into."

Ladies and gentlemen, it is too bad that everybody else didn't have Oscar Feldhamer's sense at that time. What else is contained in this Papworth report? On page 8 -- and remember now, this report is written in the middle of March of 1969. Look what they say is going to happen three months from then. But there are no Circus Wagons open:

"By 6/30/69, by June of '69, there should be at least -- at least 15 Circus Wagon Restaurants in operation."

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Not under construction. In operation. Was that a truthful statement, four months ahead? Let's see what happened. How many units were in operation? You have to turn to the very back of the annual report of 1969 and find out the truth with Richard Packing Company. This is the one that came out, and we will get to this, the following year. And you see a statement in here, that says that at June 30, 1969, none of the Circus Wagon franchises were in operation. We will get back to that, because buried in that report, which came out after everyone had purchased all the shares of stock, is the truth.

By July of 1969, before even the first Circus Wagon restaurant had opened for business, Mr. Deutsch tells Mr. Hurley by telephone, thisis July of 1969, page 1857:

"There was 100 sold, roughly 100, and 100 more ready to be sold near to closing." That is in July of 1969. And about this same time, remember when Mr. Jim Giasafakis was out on that so called field trip in Minneapolis, he was supposed to see the plant, he ended up having breakfast that morning, Mr. Deutsch is telling Mr. Giasafakis back in July, the same month, that is Giasafakis:

"I asked him about Richard Packing, that was gone into because I knew very little about the company and he indicated to me that they were selling franchises and over 200 franchises had been sold and they were ready to open their

first Circus Wagon franchise in Anaheim, California, which is right across the entrance from Disneyland."

This is July, 1969. He says 100 in the future, he told Mr. Giasafakis 200. He goes back, tells Mr. Hurley, he is very happy. He thinks he is putting a lot of money in this great company. Is that a crime, to invest money in a company that has 200 franchises? Mr. Cohen is more conservative. It took Mr. Cohen until the following winter, -- remember the letter, we had a fellow -- Faris, the fellow from California. It took Mr. Cohen until February of 1970 for him to reach the 200 plateau. That didn't stop Mr. Deutsch.

Ladies and gentlemen, ask the question that Mr. Kobson asked you to begin with:

In that situation did Mr. Deutsch lie to anybody? To get them interested in Richard Packing stock? As I indicated, various letters and press releases went to people like Mr. O'Meara, and Mr. Hurley. Government's Exhibit 4 is the one which I'm sure you recall. This is March 17th now:

"As of February 3rd we sold 60 franchises," that's Mr. Cohen, "As of February 3, 1970" Mr. Deutsch had reached 200, six months ago. "As of February, 19th, we had sold 100 and as ofMarch 4th, we had gone to 200." Less than a month. Over 140 franchises sold. But there is something that doesn't quite fit into that letter. Because Mr. Cohen has been issuing

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press releases all during this time and the figures that he was giving out in the press releases were different from the figures he put in the letter. These were just numbers to these men. Take the press releases in, ladies and gentlemen. 31B says he had 19. 31C, 19 more. 31D, 23 additional. 31E, 41 additional. Add those up and you get 102. 102 by October, 1969.

So, you've got Mr. Deutsch with 200 in July, Mr. Cohen with 102 in October, 1969, and then Mr. Cohen back down to 60 in February of 1970. These are numbers, Ladies and gentlemen. Just send out anything you want to send out. Just impress people. Thepoint of the fact is that these people couldn't even keep the numbers straight themselves, as long as they were high.

We have heard a lot of testimony from a lot of people here about how many franchises there were, and how do you count franchises, exhibits from the government, exhibits from Mr. [illegible], exhibits from everybody as to how many actual franchises there were. Mr. Faris comes in the room, and let's look at the way he counts franchises. You just use your common sense, as defense counsel told you. You answer this question:

This is the Cristina agreement. The one in Louisiana. I believe it is part of 13B-1. In the back it

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it says Mr. Cristina has been given the following option, and get this:

"After 90 days of operation of his first Circus Wagon opening, Mr. Jack Cristina may elect"-- he has a choice way down the line, "to elect a plan, and by that plan he may put up in 1970"-- this is 1969, "he may put up in 1970, 3, 4 and 5 units. In 1971, 6 through 12, and in 1972, 13 through 20. If Mr. Cristina wants to do that, he can do it."

Those units were all considered sold, whether Mr. Cristina wanted them or not, or whether he walked away. You have all heard about the accounting changes. Mr. Block made a statement which I don't believe the testimony will support. Remember, he said that the accountant took the stand and they talked about the accounting changes affecting the number of units? You read Mr. Louder's testimony. He was the accountant I believe that was called in to testify, from Minneapolis.

What did he say? He said that the change in the accounting principles affected the way you report the income but it had no bearing whatsoever on how you counted the number of units. Only the income. That's what the accountant was concerned with. The number of units remained steadfast. Review that testimony, if you like.

But ladies and gentlemen, it is much simpler, because we can look at his documents, and keep in mind Mr.

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Louder's testimony, two documents; both issued in April of 1970. One, the press release, the one that had to go out to all the funds and all the investment people; the one that is not looked at by Lybrand. The accountants don't see this piece of paper:

"Richard Packing has to date sold 210 franchises and is currently constructing seven new Circus Wagon restaurants. The date? April 6, 1970. The annual report comes out later. In the letter to shareholders written April 15, 1970, to date, 82 franchises have been secured by Status Marketing. This report, ladies and gentlemen, was looked at, analyzed and audited by the accountants. They have the contracts.

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You take this document in, you take this press release in and you compare them.

Remember in this regard about these press releases, the extensive cross examination of Mr. Frankel from Bass & Company, by Mr. Segal, whether Deutsch had anything to do with the press release, whether he saw them, his name was on the back or front of a sheet of paper? You may find the reason is that Mr. Segal well knew if Mr. Deutsch was connected with that press release or any other press releases he was in trouble.

What did Frankel say? He said he was told by Milton Cohen that these press releases were to be reviewed by Mr. teutsch. You can review the testimony in that regard. You can look at the exhibits, look at all the Frankel exhibits. Here is the back of a letter dated May 15, 1969. You recall that Mr. Segal was displeased because something was put on the back, "Okayed by Cohen, Deutsch and Malmon. Send ten copies."

Mr. Deutsch's name appears through these exhibits. You can take them, look at them and decide for yourselves whether Mr. Deutsch knew what was happening with respect to press releases and annual reports, the financial advisor of that company. His name is literally all over those documents.

Okay, ladies and gentlemen, that's the story they

were painting of Richard Packing Company. That is what the funds were being told, this great financial company, well finances, franchises going up left and right, but what do we hear from Kally and Mr. Faris? Mr. Faris was a defense witness. What did he say? He said they had a lot of problems, rising contruction costs, real estate costs, all the risk factors, the couldn't get adequate financing.

Remember Mr. Brodcorb, the long sheet of yellow paper, all the contracts being cancelled left and right and he told you about how the company was losing money and if they didn't sell their meat packing facilities, they would be out of business.

Defense counsel argue that all that was attributable to bad economy. Ladies and gentlemen, they may be right, it may be attributable to a bad economy or to Mr. Cohen's judgment. That is not why we are here. The information contains the following allegations, in part, that the defendants obtained money and property by means of untrue statements of material facts -- listen to this -- and omissions to state facts necessary to be stated in order to make the statements made in light of the circumstances under which they were made not misleading.

Ladies and gentlemen, did you see one single press release that informed anyone, or one letter that informed

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anyone, that contracts were being cancelled left and right, t that Status Marketing had gone bankrupt and was not capable of selling any franchises; that there was no more meat packing company; no more meat packing facilities available because it had to sell it out so they wouldn't go into the red, that rising costs were killing the business and that Ricahrd Packing was a financial failure? Was there any press release, any letter, any conversation to Mr. Hurley, Mr. O'Meara that told those facts? Of course not. That's not until July of 1969, when it was all too late and the funds had to sell out at $1 a share and lost 5.1 million dollars.

Did they tell anybody that while they had problems with franchising, with getting money -- you remember all the problems they had with money, whether Mr. Deutsch could raise $20,000,000, Mr. Surnow was supposed to give $20,000,000-- what did they do; they put $1,000,000 to put into a dune buggy company. Did they tell that to anybody? You heard that testimony from Mr. Brodcorb:

No money for the franchising, but they put $1,000,000 into a dune buggy company.

With respect to dune buggies, this is an example of how far the defendants would go -- how far they would go-- with respect to representations that were being made. It is a very small matter but it is indicative of how far they

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they would go in misrepresenting things. Listen to this. It says, in a press release, 1969, July 16th:

"Today's announcement was made by Milton J. Cohen, President of Richard Packing, who described the company's newest subsidiary as a designer and builder of commercial dune buggies. The dune buggy, he said, is a small, wide-track peculiar looking automobile especially adept at whizzing through sand and down beaches. These buggies can go anywhere, even if there is no road."

Well, they had forgotten that Mr. Papworth had seen the dune buggy company. He had seen the company and spoken to the people. In the Papworth report, introduced by Mr. Cohen, referring to dune buggies:

"The car is not meant to be driven off the road as a dune buggy."

There are so many different stories coming out that even the defendants can't keep them straight.

Again, ladies and gentlemen, you ask yourselves Mr. Robson's question: Were there any misrepresentations half truths? The government has been accused of making half truths; now think about the defense. Richard Packing is losing money hand over fist, as Mr. Block said, $200,000 is given to New Dimension Securities. That is very curious and I will speak about this later. Mr. Ryback only puts

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$100,000 in and now Mr. Block says Mr. Cohen wants to put $200,000 in the trading account because of his good friend, Mr. Ryback -- $200,000 in cash from Richard Packing into a trading account of a firm that just opens for business.

Did Richard Packing ever tell anybody about that? Was there a press release about that?

Well, the company is singing and what are they telling people: Don't worry about it. Mr. Deutsch tells Mr. Kally -- Mr. Kally is the disgruntled employee who was fired, and that is very strange, because what we heard from Mr. Dudovitz, in 1971 there wasn't much left of Richard Packing and, as a matter of fact, he left. I don't know what he was fired from, but we will accept the fact that he was fired. He tells Mr. Kelly he was doing a fine job, a good job of getting real estate and construction jobs started. He, Mr. Deutsch, also added that he had a commitment for $20,000 from a European source and that Kally should proceed with all dispatch to get these projects started. $20,000,000.

February, 1970, what does he tell Mr. Deane? Mr. Deane says he is very concerned because his client, the St. Croix fund, had not received his annual report and they had no financial information on the company, and they were nervous about the stock, because the market was declining and

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Richard Packing was still on its way up.

Mr. Deutsch replied, "Don't be concerned, Hugh, forget about the annual report" and get this, "It is not significant. I have fifteen to twenty million lined up to handle the 200 Richard Packing Circus Wagon franchises that we have sold."

Mr. Hurley, what is he told? Same thing, 15 to 20 million dollars lined up and this time it is not a foreign source, it is a union pension fund. It doesn't make any difference. Mr. O'Meara, same thing: He is told in March of 1970:

"The only problem we have is with the accounting changes which we have adequate financing, everything else is perfect, just the accounting changes."

Ladies and gentlemen, who was the victim? You can look at the Denver funds as a mutual fund and say they were one victim, but Mr. Hurley didn't lose 5.1 million dollars. He wasn't the mutual fund. The mutual fund, as Mr. Hurley testified to, consisted of many thousands of small people who entrusted their funds to themutual funds to invest. Jaffee & Company was asked by the mutual funds to help them out and trusted them.

Meanwhile, where was the 1969 annual report, ladies and gentlemen? We know that Lybrand -- Mr. Louder

said he was through with it in March of 1970 and Mrs. Segal said she mailed it out all at one time and her best recollection was the spring, and Mr. Deane said his best recollection was April. So Mr. Clayton had thrown into his file the 1969 annual report and Miss Segal said when the report came in, you remember, she had all the labels and she stuck them on the envelopes and out they went, and you recall that the address on that label -- I'm sorry, the date on the label, on the stamp, was July of 1970. Now, get this:

Milton Cohen, to Bass & Company, the people making up the annual report, and this letter is dated March 19, 1970, talking about the annual report, in block caps, "I DON'T WISH THIS STATEMENT TO BE DISTRIBUTED TO ANY MEDIA WHATSOEVER." He will take care of it. March 19th, this is when Lybrand was through with it. You ask yourselves why it wasn't mailed out until July. The answer is very simple, because of the blunt truth about that company.

Counsel told you when you go into that jury room to use your common sense, and I am going to ask you to do the same thing. Don't abandon the way you look at things, your judgment. Deliberate and use your common sense. Defense counsel anticipated the problem, and as a matter of fact, they did this in their opening statement, and did it

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throughout:

If they knew that it was established there were misrepresentations and that people relied on these misrepresentations, there would be problems. So what did they do? They tried to convince you that the Denver funds didn't rely on these misrepresentations but they reviewed and reviewed and reviewed. Do you remember all that testimony from Mr. Hurley? There is one small problem with this and this is a smoke screen, to could the issues.

You listen to Judge Ward's charge and he will tell you that whether the mutual funds relied on the representations doesn't make a difference, it is the misrepresentations themselves which are important. It could have been a five year old boy out there; it is the lies we are talking about. Whether anyone listened to them or not is irrelevant. You listen to that portion of the charge.

But defense counsel preferred to overlook this. Instead they wanted to paint a picture of Jack Hurley and all the other mutual funds out in Denver reviewing daily Richard Packing. Mr. Segal said in his opening statement he would demonstrate the Denver funds made a review every time they purchased. He said the defendants would demonstrate a re-review was made every time they went over their portfolio. Mr. Robson said the mutual fund had talented,

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experienced, educated people whose sole function was to try to decide how much future hope there was for a business and you will hear on the witness stand when this mutual fund over a period of months invested $5,000,000 it was not on the basis of what Mr. Milton Cohen said or on the basis of what Deutsch said or what Stanley Duboff said, it was on the basis of studies they made, it was on the basis of their own very, very careful evaluation.

Let's take a closer look at this. You saw Mr. Hurley on that witness stand and you saw him cross examined ad nausem about his training with IBM and what kind of computers he was installing at Financial Programs and programming computers, and his psychology degree he got in 1961 and all the turn over of the people at Financial Programs but, ladies and gentlemen, you have the job of deciding how sophisticated Mr. Hurley was.

The government submits that he wasn't that sophisticated at thattime, that he was relying and paying Jaffee & Company to provide him with truthful, relevant information on Richard Packing Company, and this is why, ladies and gentlemen, Mr. Hurley was such a gold mine for Mr. Deutsch, betting on the jockey, not on the horse.

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Let's take a look at these so-called studies that went on at the mutual funds. You remember James Giasafakis. He was the fellow that supposedly made this field trip to Minneapolis and went to the plant and analyzed the plant, talked to Mr. Cohen, made a full evaluation of the company. Mr. Giasafakis came to the stand and testified that he spent twenty minutes with Milton Cohen and Bernard Deutsch over breakfast. That is the breakfast in which he was told, in July of 1969, but Mr. Deutsch -- or shortly after breakfast -- that there were 200 franchises that had been sold.

What else did he do? He went to an engagement party for Mr. Cohen's son. He never even saw the plant and he never wrote a report.

Then we heard about a John Conrad. Mr. Hurley was asked didn't John Conrad write a report, and Mr. Hurley said he thought he did, and Mr. Giasafakis said he wrote a report in the summer of 1970, after the Funds had stopped buying. There was cross-examination about Winifred Finch and she was painted as the analyst who wrote an extensive report on Richard Packing, and Mr. Giasafakis tells us her line of speciality was cosmetics, women's apparel and specialty shops, and that she in fact had not written a report on Richard Packing.

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Defense counsel tried to show you Mr. Hirshheimer, Mr. Heisderberg were vice-presidents and every day reviewed Richard Packing, daily meetings, and tried to point out that investment committees were flourishing out there; everyone was sitting around looking over Richard Packing stock. Listen to the following questions and the answers that came, because this is the testimony and this is what you are concerned with, not my comments or defense counsel's:

"Q I will direct your attention specifically to the purchasing of Richard Packing Stock. Can you tell the Court and jury what instructions were given to you by Mr. Heisderberg with respect to the 50,000 shares that you purchased?

"A None.

"Q What instructions, if any, did Mr. Hirshheimer give you with respect to the 50,000 shares of Richard Packing that you purchased?

"A None.

"Q Did he, Mr. Hirshheimer, the trader, ever decline to execute for you any Richard Packing stock?

"A No.

"Q What was the function and purpose of the evaluation commission?

"A As best as I know, it was to value unregistered

stocks that were held by the Funds" -- unregistered. This is Mr. Hurley.

"Q Did the Funds ever buy any unregistered Richard Packing stock?

"A No.

"Q I would like to refer back to the daily meetings. Did you generally discuss Richard Packing at these daily meetings?

"A No."

Mr. Robson went into the issue of Mr. Giasafakis as follows:

"Q There was a procedure, was there not, after a Fund manager recommended purchase of a stock, for an authorization to be established for a certain number of shares, up to a certain number of shares?

"A What do you mean, a procedure?

"Q Was there a procedure within the organization?

"A The portfolio manager had an authorization to do what he pleased."

And that is what was happening out there, ladies and gentlemen. Mr. Hurley, Mr. Anton and Mr. Frankenthaler could make their own decisions and in this case they relied on Jaffee & Company and paid them for that service. As hard as defense counsel tried, this picture could not

be changed.

Now, Mr. Robson asks, why didn't the Government bring in the other Fund managers and Mr. Anton and Mr. Frankenthaler, and I believe Mr. Block asked why we didn't bring in that fellow, Surnow. They suggest that the main reason for this is that we were afraid if these guys took the stand they would contradict Mr. Hurley, somehow not help the case.

Well, ladies and gentlemen, you listen to Judg Ward's charge in that regard, because defendants put in a case, put witnesses on the stand -- they are not obligated to do that, but they did, and they have the power of subpoena as well as the Government, and you can rest assured yourself that if these gentlemen had anything to say favorable to their defense, they would have called them.

What was happening meanwhile on the basis of these misrepresentations? People were buying and buying, and buying. 156,000 shares out of 200,000, approximately, ended up in the Denver Funds. That is approximately 75 percent.

Government's Exhibit 50, the chart, reflects all the purchasing that was done by the Denver mutual funds and there is no question, ladies and gentlemen, and

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we are not arguing with this, they knew what they were doing. They thought that they were investing in the next McDonald's. They were relying on the representations made to them by this flourishing company and they wanted to buy, and they bought and they bought and they bought, and they believed it. Sure, they knew the price would go up, because they were buying a well-financed, good, solid company, or so they thought.

Ladies and gentlemen, while Mr. Deutsch and Mr. Cohen had gone west, Mr. Duboff stayed east. Someone had to engineer all that stock to the Denver mutual funds; someone had to direct Bernie Shwidock at a place that buys and sells. Remember the woman from London who testified? Shw was his assistant and she needed direction, and Mr. Duboff provided it. Someone had to provide direction to Mr. Mazzeo, Mr. Rothman, Mr. Naddeo, Mr. Ryback. Someone had to make sure that the stock got out to Denver, that the price went up and that everyone lined their pickets in the process.

Mr. Duboff's job was made very simple, ladies and gentlemen. What happens when there is a small supply of a commodity and a lot of people want it? What happens to the price? It is no different than, for example, the oil crisis we had last winter. There was a lot of

demand for oil and gasoline and there was very little of it and what happened to the price?

His job was easy, because what did people tell Mr. Deutsch and Mr. Duboff? Mr. Deane says, "If you see any stock, please show it to me." That is Page 587 of the transcript.

Mr. Hurley, in the spring of 1969, says to Mr. Deutsch that he and Mr. Anton "will be interested in seeing all the stock in Richard Packing that he, Deutsch, could show us."

So Stanley Duboff's job, ladies and gentlemen, was not a difficult one. It was no different than a service station attendant pumping gas. He had a lot of customers and they would take as much and at whatever price they could get it at.

Just as the project is getting under way, just as Richard Packing is beginning to see its light, who walks into Jaffee & Company? Mr. Shwidock. Mr. Shwidock is perfect for this, because they can do all their trading in Richard Packing through Kelly, Andrews & Bradley and they don't have to show their hands in Jaffee & Company, no one will know what they are doing. Remember all that idea about secrecy: No one in Jaffee & Company would know they were involved. On top

of this they would hopefully get 50 percent of the profits Kelly, Andrews & Bradley made, which went down to 30 percent. This was fine for Mr. Shwidock. He was opening his doors for the first time and what a great delight to get the business from the prestigious Jaffee & Company.

Shwidock, after his conersation with Mr. Driesman, who is his partner, agreed to this 30 percent arrangement, and the following rules were laid down by Mr. Duboff, and this is the game plans and the rules Mr. Shwidock had to operate under:

"1. That all trading in stocks designated by either Mr.Deutsch or Mr. Duboff, to be traded by them exclusively. In other words, they were to tell me how to buy and how to sell, whether to buy and whether to sell, that at the end of every month all net profits in these trades, the stocks designated by them, were to be considered part of the deal. The only deal we had was related to stocks that they were involved in.

"Thirdly, I was not to front any orders. And the last point is that nobody is supposed to know about the arrangements between us."

When the deal is all established, the trading starts, and Kelly, Andrews & Bradley doesn't do too bad for a new little house just starting out, because by April of

1970 almost 20,000 shares find its way through Kelly, Andrews & Bradley.

Now, defense counsel say, "What is 20,000 shares?" Well, there are only a hundred thousand shares outstanding and Mr. Deane said he had 10,000 and you have to assume that other people were not interested in selling. So 20,000 shares -- I believe it was 18,900 shares, go through Kelly, Andrews & Bradley, and that is not a small amount. We are talking about one-fifth of all that was available for trading. With that, they make $50,000. That is not bad for a small, little house just starting up, and they give 30 percent of that back to Mr. Deutsch and Mr. Duboff, and they also did pretty well in other stocks.

You recall Mr. Shwidock said from that witness stand that he made a hundred thousand dollars trading Status Marketing stock. A hundred thousand dollars. He said he gave 30 percent of that back to the defendants.

With respect to that, please listen to Judge Ward's charge as to how you consider that.

So, Mr. Shwidock had a pretty good deal for someone just starting out in business. But Mr. Shwidock couldn't get these payments out in cash, because they would show up on his books. So what did he do? He is introduced to a man from Switzerland, Jack Reiss, and he meets the guy

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for a minute, is introduced to him by Bernard Deutsch, and he is ushered down to Bernard Duboff and it is explained to him, "We have an easy way to settle all this: Send the money to the Reiss Bank and we will make sure that Mr. Reiss sends you in return all those services" -- remember those letters about commodities, none of which had anything whatsoever to do with Kelly, Andrews & Bradley's business? For those sheets of paper, Kelly, Andrews & Bradley paid $90,000.

Ladies and gentlemen, these services, the checks are in evidence, but just take these into the jury room with you and examine them, as you did before. $90,000? Defense counsel made the curious argument that Mr. Shwidock was sending this money, he was secreting it out of this country and putting it into a Swiss bank. If he wanted to put money in a secret Swiss account, would he sign his own name to the checks? Would he sign his own name and send $90,000 to a Swiss bank if he wanted to hide it? The checks are right here.

But what a neat little arrangement for Mr. Deutsch and Mr. Duboff, to have Mr. Shwidock send the checks out to the Reiss Bank, get the phony services in, fill his files with it, and he will have a great excuse. The only problem was when those files came in -

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you remember Mr. Shwidock kept saying those files were useless and anybody looking at them, after they came in, would say, "Wait a minute, $90,000 for this?"

So he is approached by the accountant and the accountant smells something wrong, and Mr. Shwidock knows if he brings in these services and shows them to the accountant, the accountant is going to laugh. What does Mr. Shwidock tell him? He is not going to admit he is paying secret kickbacks to Deutsch and Duboff. He is not going to admit at that stage he is a criminal. Of course not.

Well, it is some Israeli land deal. It could have been a Vermont land deal.

Let's see if we can figure out who had connections abroad, Mr. Deutsch or Mr. Shwidock. Mr. Shwidock testified that he had never left the country. How about Mr. Deutsch? Remember the conversation with Jack Hurley? Jack Hurley telephones Bernard Deutsch and is trying to help Perry Leff with the company in California, and they are in desperate need of money, and he calls and says this to Mr. Deutsch: "Well, I said that Perry's company could do all right but it was running out of money and could we get some money for it, and he was overseas at that time. He was in Israel or Switzerland. That is the best

I can recall. I can summarize what I said by saying I came on strong for Perry Leff and to get money into Dimension 5 and I asked Mr. Deutsch if he could raise money for the company." And a day later, he says, "It was in the same period and he said he would commit a hundred thousand dollars to Dimension 5." Just like that.

Of course, we heard all about the 34-A. You remember, Mr. Leff comes in and he receives these bank drafts that are drawn on these English banks for something like 40,000 pounds, something like that, and that is the equivalent, I believe, of approximately a hundred thousand dollars.

I don't think it takes any great deal of mathematics to see who was the international financier between Mr. Shwidock and Mr. Deutsch.

Here we have a strange part of the case. Mr. Shwidock is indicted and he's been questioned about the Swiss payments. Remember that? He was questioned by the U.S. Attorney's Office about the Swiss payments, about what do these checks mean? He hasn't seen Mr. Deutsch in three years. In three years he hasn't seen Mr. Deutsch, and he's just been questioned, and he's just been indicted, and out of a clear, blue sky Mr. Deutsch calls up --

MR. SEGAL: Objection, your Honor, as not accurate.

MR. FEFFER: Was it Mr. Shwidock calling Deutsch -- well, the record will speak for itself. I thought it was the other way.

Whatever it is, there was a telephone call, and the call is conveniently tape recorded. Just conveniently tape recorded. Nice little friendly chat.

Ladies and gentlemen, why would Mr. Deutsch be so concerned with Mr. Shwidock's welfare? He hasn't seen him in three years. They aren't personal friends. Why would he be so concerned about whether the U.S. Attorney's Office asked him about Swiss bank checks, the Reiss

documents? Any sense at all unless Mr. Deutsch knew that Mr. Shwidock was capable of blowing the whistle? The only possible motive he had, ladies and gentlemen, was simple: He knew, he knew that if Mr. Shwidock ever talked, that he'd be right there on that witness stand, and how convenient it would be to have a tape, a tape of a man who was frightened because he was indicted, a tape of a man who was proclaiming his innocence, a tape of a man who was scared.

Remember that. Defense counsel were saying about painting this picture about this man whose life was being made miserable by the U.S. Attorney's Office, we are causing him to lose his job, his family was suffering -- I think Mr. Segal used the phrase, "the office was holding him by his throat."

That is very interesting, ladies and gentlemen. Mr. Shwidock on the stand said that he was a felon, that he committed crimes. He admitted that. He said he had committed two felonies, at least, if not more. And he admitted that he was mad at the Government.

And Mr. Segal apparently thinks there is something wrong or it is the U.S. Attorney's fault when a man, because he committed a criminal act, suffers for it financially. That is the fault of the U.S. Attorney's

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Office.

And Mr. Shwidock testified:

"Q When you talked to Mr. Deutsch, you knew that you were guilty as charged in that indictment?

"A Yes, sir.

"Q And you were fighting it?

"A Yes, sir.

"Q And you were mad?

"A Absolutely correct."

What a great opportunity for Mr.Deutsch to tape that telephone conversation.

Is the U.S. Attorney's Office, ladies and gentlemen, really responsible for his financial plight? It came out that he was offered the opportunity to cooperate. Before each of the indictments came down he was told that he was going to be indicted, in advance. And initially he chose not to cooperate. He finally did.

Ladies and gentlemen, this is the oldest trick in the world. Bernie Deutsch and Stanley Duboff and Milton Cohen are on trial here for violation of the federal securities laws. But let's forget about that. Let's have Mr. Shwidock's trial right now. Let's put Jack Hurley on the defense table. Let's try him. Let's try all the Denver mutual funds. Let's try Mr. Malmon. Let's

try everyone else in the world except the people whose guilt or innocence you are supposed to determine.

It's not going to work, ladies and gentlemen, because the defendants are sitting at that table. Those are the only people in this courtroom and nobody else. How else did Mr. Shwidock pay Messrs. Deutsch and Duboff their 30 percent?

"Mr. Shwidock: Mr. Duboff told me that he had purchased some paintings or art work from the studio, that he was having the bills sent to Kelly, Andrews & Bradley and I was to pay the bills, and the money, or the cost of the art work, was to be charged against the 30 percent charge that we were paying him.

"Q What happened next, Mr. Shwidock?

"A I received, I believe, two bills and I paid them. And shortly thereafter I received a crate of art work.

"Q After that time, what happened?

"A Mr. Duboff came and picked up the art work."

42 in evidence, ladies and gentlemen, the art work bills that Mr. Shwidock was talking about. Stanley Duboff, as we see later, had a habit of furnishing his home through brokerage houses. You recall the furniture that he purchased and had New Dimension pay for. We will get to

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that.

Ladies and gentlemen, defense counsel argue, after telling you that you should feel sorry for Mr. Shwidock, they say in essence that he is a man who has been dragged down to the gutter. Ladies and gentlemen, he said that he was hoping for the best, and that he was on that stand and he admitted saying in May of last year some terrible things about this office, the Office of the U. S. Attorney. Does that sound like a man who is not telling the truth, a man who would admit openly and readily as Mr. Shwidock did? He was cross-examined by defense counsel extensively. I think there are over 600 pages of that man's testimony.

But what did they question him about? The facts in the case? Very little. They attempted to establish that Mr. Shwidock was a criminal. Ladies and gentlemen, counsel didn't have to spend all that time doing that. Mr. Shwidock admitted all of the sins on direct examination; he admitted them fully on cross-examination.

Do you really think that Bernard Deutsch and Stanley Duboff would receive kickbacks from an exemplary citizen, from a law-abiding citizen? Of course not.

More important, with respect to the credibility

of Mr. Shwidock, it is you and all of you that must gauge his credibility. It is not Mr. Block, Mr. Segal, Mr. Robson, myself; it is not even Judge Ward. It is your responsibility. You sat a few feet away from that man and you saw some very shrewd and very clever defense counsel cross-examine him at length.

You ask yourselves these questions: Was he evasive? Didn't he answer every question that was put to him, even those that put him in a very bad light, openly and responsively?

Another factor to determine Mr. Shwidock's credibility: Remember, in late 1968 he says that "Bernard Deutsch called me and told me that he was having Guys with Buys to send me a couple of bills and I was to pay out against those bills and charge it off within our company to office expense and against the 30 percent cash that we were to give back."

Mr. Shwidock testified that he received the bills and he paid for those by two checks. The two checks were introduced in evidence. Mr. Shwidock, it can be charged, was paying those for his own purposes, but we have heard endless testimony about Guys with Buys.

Guys with Buys, ladies and gentlemen, was that store that Mr. Ryback sold. Remember, Mr. Deutsch's life-

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long friend? Who do you think was receiving the benefit of that money, Mr. Shwidock or Mr. Deutsch?

Ladies and gentlemen, let's turn to this point. Let's turn to the actual way and the method in which the stock of Richard Packing was traded, and you recall this, recall that Mr. O'Meara said when he testified:

"The stock market has already placed a high price on the issue reflecting its favorable expectations of the company."

That was way back in, I believe, 1969, December of 1969. And he explained this as follows:

"The price, if I remember, at the time was $35 or $40 a share for a company that was very small in size, and that had a very little beginning. To have a price of $40 a share was quite extraordinary."

And Mr. O'Meara went on:

"Because the amount of money relative to the market was not that great. Any wealthy firm or individual could artificially bid up the price of the stock of a company that was that small."

Ladies and gentlemen, this is exactly what happened. What did Mr. Deutsch tell Mr. Ledbetter? Remember? The last Government witness, on the direct case. He knew where every single share was out of 200,000 shares

that were outstanding at that time. This made Duboff's job a very simple one. He could easily direct Bernard Shwidock, Gerry Nelson Quinn, Hugh Deane, Mr. Mazzeo, Mr. Rothman, Mr. Ryback, and all of them to pick up shares and funnel them right through Jaffee & Company to the Funds. And in this way he had very little difficulty in reaching that extraordinary price of $40 per share that Mr. Mayer talked about.

Let's keep this in mind, because Mr Mayer appeared on the stand yesterday as a witness for Mr. Deutsch, and let's see what else he said.

He already told us about how important the element of trust was. Mr. Mayer told us a lot more. A lot more. Because he told us about how important it was for a trader -- we are talking about Kelly, Andrews, Mazzeo, New Dimension Securities, all traders, how important it was for them to maintain independence for the freedom of the market:

"Q Those people who called you to place orders for stock, would they tell you the price that you had to buy at to fill that order?

"A Well, I like to consider myself a market-maker, an independent individual, so no one tells me what I do. I do as I see fit."

What is he talking about? He is saying that he runs his business according to how he sees fit. No one tells him what to do. He is not directed to do things. He runs a fair, free market.

Now let's see how Messrs. Deutsch and Duboff felt about this, about the so-called freedom of the market place. Mr. Shwidock describes how he sold shares of Richard Packing: "I would get a phone call from either Mr. Duboff or Mr. Deutsch advising me that I sold a specified amount of stock of Richard Packing at a price to a designated broker. I would then call the broker to confirm the fact."

The price was given to him by Mr. Deutsch or Mr. Duboff. They set the price.

When he purchased, Mr. Shwidock went on to say how he purchased shares of Richard Packing stock: "The same way. I would get a telephone call from either Mr. Deutsch or Mr. Duboff advising me that I was buying" -- "that I was buying" -- Mr. Deutsch and Mr. Duboff were telling Kelly, Andrews & Bradley, another firm that he was bying -- "a specified amount of stock at a designated price from a broker, and I would call the broker and say, 'I am buying so much stock from you at such-and-such a price.' And he would say -- and I would write my

ticket and clock it."

I wonder if Deutsch or Duboff ever told Mr. Mayer about that type of trading.

Ask yourselves, ladies and gentlemen, who was controlling the trading that went on in Richard Packing in Kelly, Andrews & Bradley. Mr. Shwidock and Gerry Nelson Quinn were like robots. They got telephone calls and went to it, and it wasn't a bad deal, because they made a lot of money.

This is interesting, because you have heard so much about Mr. Shwidock not being a credible person, but Gerry Nelson Quinn said the same thing from that witness stand, about how she got orders and how she sold shares of Richard Packing stock.

Let's take a look at one transaction, ladies and gentlemen -- two, I'm sorry, two transactions, to give you an idea of what was going on at Kelly, Andrews & Bradley.

And I think if you listen to this you will get an idea of how Mr. Deutsch and Mr. Duboff were working. On October 4, 1968, Stanley Duboff calls up Bernie Shwidock and tells him that he is buying 5,000 shares at 28.

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That is a good price. Below the market. And you're selling 2,500 of those shares to "X", another brokerage house and another 2,500 to another brokerage house at $32 a share. Not bad. That's about $25,000 profit.

October 7th the same thing happens. Mr. Duboff calls up and he tells Mr. Shwidock, 5,000 more shares coming in, you get it at $28 a share, send it right out the same day at prices ranging from 31 to 35 dollars per share.

Again, approximately $25,000 profit to Kelly, Andrews & Bradley for doing, just making telephone calls and writing a few orders.

Ask yourselves, ladies and gentlemen:

Why is Mr. Duboff, in this case, giving Kelly, Andrews & Bradley the opportunity to make so much money? Mr. Robson asked, why didn't he do it himself? His firm could have sold them. They came from Jaffee. These 10,000 shares came from Jaffee. Why didn't Jaffee sell these shares? What did they need Kelly, Andrews & Bradley for? They knew they were going to. The answer is: They wanted thirty percent of the $50,000 that was made on those two transactions. It is very simple.

Later on you will see that thirty percent wasn't enough. No, they wanted a hundred percent. They wanted all the market, and that's why New Dimension was formed, and we

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will get to that. Defense counsel asked you, how come Kelly, Andrews & Bradley wasn't used after March of 1969? Why did Kelly, Andrews & Bradley disappear at the time when they needed them to go to the funds? Well, Mr. Robson brought that out on cross examination. He asked, and Mr. Shwidock told him, thatKelly, Andrews & Bradley was suspended by the National Association of Securities Dealers in march of 1969. And they were suspended and not allowed to conduct business for a short period of time because of what is known as a net capitalization, which means at that time assets of that firm were insufficient.

So what do they do? V. F. Naddeo, big house, big wire board, capable of getting in from all over the country all these shares of stock which it could then feed into the funds. And this is exactly what happened. Take a look at Government's Exhibit 50. You will see that the major source ofsupply between April and October is V.F. Naddeo. You will notice something very interesting that was said yesterday too, by Mr. Mayer. Mr. Mayer said that if a firm like Jaffee wanted to maintain secrecy, they had to use one market maker. Do you remember that?

Remember when Mr. Mayer looked at this chart and you will see that there are other market makers that were supplying Jaffee. Mayer & Schweitzer was one of them. New

York Hanseatic was one of them. Gardner Securities. And it goes on. Allessandrini. They were really trying to keep it secret, ladies and gentlemen. Mr. Mazzeo testified in essence that his trading thirty or forty percent of the time, he was careful to limit it to thirty or forty percent of the time, that was his best recollection, was conducted in a very similar manner to that described by Mr. Shwidock and Mrs. Quinn. He was directed where to go to purchase orders for Jaffee. You will recall that Mr. Mazzeo said that during that time he filled approximately 600 orders each day,and that he spoke to a minimum of 100 brokers on a daily basis on the telephone.

What else did he say? He said that except for Mr. Deutsch and Mr. Duboff he was never told by another broker where to purchase and how to fill his orders. With Mr. Mazzeo, we went through one transaction with Kelly, Andrews. I'd like to go through one transaction that took place at V.F. NAddeo and I think this may serve as a guide.

Remember now, defense counsel said that the intention of Mr. Deutsch and Mr. Duboff was not to raise the price up. Everything was being done in a way to keep the price low. Remember that? Let's see. April 4, 1969:

See these 1,500 shares over here on Government's Exhibit 47? 1,500 Mr. Morginstin's account, 1,500 to Mr. Harris' account. These shares ended up in the Denver mutual

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funds. Jaffee, Mr. Deutsch and Mr. Duboff, didn't go to Kelly, Andrews & Bradley to buy that stock. They told V.F. Naddeo to go to Kelly, Andrews & Bradley and have V. F. Naddeo purchase the stock that belonged to their relatives.

An extra step, an extra link. So what was the result of that? V. F. NAddeo goes in and buys the stock at 32 and 7/8. But V.F. Naddeo has to make some money on the deal too, so they reaised the price an eighth of a point and give it to Jaffee for the fund. Jaffee could have gone to Kelly, Andrews & Bradley, they certainly knew that MR. Harris and Mr. Morginstin held those shares there, and done it directly themselves.

But they didn't, and they didn't because they wanted to create activity in the trading of Richard Packing stock so that when people looked at Richard Packing, they would say, would you, look at the excitement in that stock; look at the price moving up. And that's how the stock was manipulated, and that's only one example, ladies and gentlemen, an easy one for you to follow.

And Mr. Robson on cross examination went through a long list, remember the long list of houses that he talked to with Mr. Mazzeo? Remember, Mr. Mazzeo was unable to recall the names of certain houses? And he asked him, were these the houses that you were directed to, and Mr. Mazzeo could

only remember two of the names that were supplied by, at that time, by Mr. Robson.

Well, what does Government's Exhibit 86 show there in -- that's the chart of all the trading, and it has, I believe, it has some 92 different houses here that Mr. Naddeo went to to purchase stock. And you recall that Mr. Robson I believe asked him approximately 30 houses. He didn't ask him about 56 additional houses. And those 56 additional houses supplied Mr. Mazzeo, by this chart, with over forty percent of all the shares.

In any event, Mr. Mazzeo had no complaints, because what an easy job it was. You get a telephone call, you fill the order, you make your points, and you send it on. It was a very, very simple job. It was easy money. But what happened? There was a problem.

Mr. Duboff, remember that, he called up Mr. Mazzeo and he asked Mr. Mazzeo, he directed Mr. Mazzeo, that even when I don't have an order with you, even when I am not placing and order of stock with you, I want you to trade the way I see fit. And Mr. Mazzeo, like Mr. Mayer, said,"Uh,uh, nothing doing. You gave me an order, I will fill it your way. Otherwise, nothing doing." Mr. Duboff hung up. He wanted to call the shots. Remember, this is October, 1969. New Dimenstion was going to open up in Decmeber, 1969. So

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they didn't have a long time to wait. So where do they go between the time Mr. Mazzeo is finished and the time New Dimension opens its doors in early December? Where do they go? Allessandrini & Company.

Remember Mr. Ray Weiss was one of the co-conspirators against Mr. Shwidock, one of the people where Mr. Deutsch and Mr. Duboff directed Mr. Mazzeo to fill orders, directed Mrs. Quinn to? So Allessandrini comes in and serves the purpose.

And then December 7th, I believe, Mr. Rothman testified, or thereabouts, December 4th, the big day. New Dimension Securities opens for business. Here, ladies and gentlemen, is where the big money was made in the trading of Richard Packing. Over $100,000 made in the trading of Richard Packing in four months. That's on top of the commissions and everything else we will discuss. $100,000 in one stock.

In this regard, Government's Exhibit 83 should be examined by you closely. This is the trading that went on at New Dimension Securities, and most interesting thing about this is to compare this with Mr. Mazzeo's trading. Remember, Mr. Mazzeo said that he'd make an eighth or a quarter of a point, maybe twenty-five cents on each share that he would send over to Jaffee for the fund? Remember that?

And you can see it on that chart. He is buying stock and it isgoing out at slightly higher prices. Take a look at the New Dimension chart. And you look, you can bring this with you, you can look at the prices that the stocks are being bought at and the prices that it's being sold at. There is usually a three or four dollar per share difference and 40,000 shares goes through New Dimension. 40,000 shares go through New Dimension in four months. Look at this. New Dimension Securities opens for business in December, and no longer do you find 100; 200; 400 going through, you found 1,000; 1,000; 1,000; 3,000 -- look at that, all the way down the line. Every single share going through New Dimension Securities.

What's happening? Every share coming in goies in at $40 and goes out at $44. And they are all going to the mutual funds.

MR. ROBSON: I have been sitting patiently, your Honor, and I really can't stand to sit and listen to mis-statements. I have a list of 12 of them --

MR. FEFFER: Your Honor, I object to this.

MR. ROBSON: You object? I object, Mr. Feffer.

THE COURT: Let me explain something to the jury. In the final argument counsel give you their recollection of the evidence as it was presented, just as what actually

happened in your recollection governs over my own. It also governs over whatever counsel tell you in their final argument. What counts is your recollection and the manner in which you can verify your recollection is, after you have retired, to ask for any evidence, any documents which are in evidence which can be sent in to you in thejury room and studied by you.

In addition, if you don't recall clearly what a particular witness said, you can send out a note; I will bring you out from the jury room and the court reporter will read the portion of the testimony which you wish to hear.

You may proceed.

MR. FEFFER: This morning we heard that New Dimension Securities was selling short, so therefore they had necessarily not to be part of any manipulation. Let's go back to Mr. Mayer again, Mr. Duboff's and Mr. Deutsch's witness:

"Q What did the market make if New Dimension knows at the time of the execution of a short sale that there are other people who want to sell at that time?

"A Well, it would be to his advantage."

Let's look at the way the trading was conducted at New Dimension Securities and see whether when they sold short theyknew about people who were selling. At the same

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time, before we do that, I want you to remember:

What Mr. Hurley was told by Mr. Deutsch in May of 1969. "If we, the Denver funds bought the shares from Jaffee we could get better prices than if we bought this anywhere. Not there, bought them on the street, so to speak, but Jaffee would give them to us at the bid price, plus the commission."

Let me just step back a second and let me at this time refer to Exhibit Y. This is the exhibit that was put in by Mr. Duboff, and you recall that there was quite a bit of testimony yesterday on this. I want you to look at this carefully, because you will see here that the first sheet under "Price" the price limit of 34 all the way down the sheet. See that? That's for trades up until April 9th. Look what happens after that.

I will start with April 28th. It changes. There is no longer a price limit. The market "n.h." All the way through. No longer any price limits. Market N.H., Market N.H., Market N.H., Market H.H., Market N.H. -- all the way through, Market N.H. What does Market N.H. or Market Not Held mean? Mr. Mayer again:

This is a question asked by Mr. Segal. This is in response to a question by Mr. Segal:

"A A market not held order means buy the stock in the best market available. The person giving the order,"

Mr. Hurley giving the order or Denver funds says "not held." He is giving discretion to the person executing the order to use his best judgment in executing it. He is giving Jaffee discretion to execute the orders.

Mr. Robson asks the question ad we get this response:

"The purpose that you're being given the order not held is because the party giving the order feels that you have the ability better than he to determine what price you should buy at."

So what does that mean? That Jaffee & Company and Mr. Deutsch and Mr. Duboff were able to execute as their judgment saw fit. And the New Dimension chart shows you how that judgment was carried out. Shows you where the men went. We have another interesting comment. Remember, Mr. Robson points to this chart and he says "Well, look, they had a 20,000 share order and it took them three weeks to fill it."

What is so unusual about that? At this time there are 100,000 shares outstanding and you remember Mr. Deane has some and other people have some. So even assuming there are 100,000 shares totally available, is three weeks a long time to bring in 20,000 shares? What do you think, you press a button and all the shares come jumping into the fund? It doesn't make any sense.

Ladies and gentlemen, is there any doubt in your mind that Mr. Deutsch and Duboff gave all this business and profit to New Dimension, and was it because they wanted to do it for good, old Stanley Ryback; wanted to give Stanley Ryback $100,000 in one stock? They spent days and months in California, back in New York City on the telephone four, five times a day -- a friend? Let's see. The first reference we have here to a new brokerage house was by Mr. Shwidock. Remember, Mr. Shwidock was called over and they wanted to buy him out, wanted to buy out Kelly, Andrews & Bradley. What did they say? This is the offer, back in June of 1969, before New Dimension got going. They were going to use Kelly, Andrews & Bradley:

"I was to receive ten percent of the stock in Kelly, Andrews & Bradley plus a trading account, salary and expenses." This is Mr. Shwidock -- "And the balance of ninety percent would be put in the name of Stanley Ryback with the understanding

Stanley Ryback would have just a very, very minor interest in this thing and the balance would be controlled by Deutsch and Duboff."

That gives you some indication of the role of Ryback.

As you will recall, Bernie Shwidock for the first time turned around and said "No dice. My partner, Mr. Driesman, is not going to sell out." What did Mr. Rothman testify to? He testified he was called in by Mr. Deutsch and you remember he was the man with the bad memory, the guy who had a faulty memory, who Mr. Deutsch hired and who was called here as a defense witness, and he wasn't licensed to trade stocks, but he was called in to set up the back office of a new brokerage company, and he was told what, one percent, and what happens thereafter? He sets up New Dimension Securities and then Mr. Deutsch and Mr. Duboff decide "We want a California office" and Mr. Hurley who has been painted the villain is asked to join New Dimension Securities, and he does.

Ladies and gentlemen, Government's Exhibit 37 came in a long time ago. What happened? Mr. Deutsch sits down in the Regency Hotel and Mr. Hurley says to him "What's in it for myself and Mr. Flueger, another fellow who was there and was going to join them and Mr. Deutsch writes out on a sheet of paper percentages for New Dimension Securities:

"B. Deutsch, 26; Jack Hurley, nothing; Stanley Duboff, 25; Stanley R., 5; Milton Cohen, 12; Hugh Deane, 5."

Do you remember what Mr. Rothman said, the cashier, one percent? It is right here, "Cashier, one percent" but he never got his one percent and Mr. Flueger and Mr. Hurley never got a percent either. Take this into the room with you and you determine whether Mr. Deutsch and Mr. Duboff had anything to do with New Dimension Securities or was it just a matter of helping out an old friend.

There is plenty more, because after Mr. Hurley goes to work at New Dimension, what happens? Who does he take instructions from? Mr. Ryback? No. Mr. Deutsch and Mr. Duboff.

Remember, the office that had "Dimension Management" on it in California and Jack Hurley went up there and asked Mr. Deutsch about this office and Mr. Deutsch tells him that this office is the one that's going to be the west coast branch as soon as it was cleared to do business, New Dimension Securities. What did Mr. Austin learn about that little room out there, the office with "Dimension Mangement," Mr. Deutsch's office, in California, not Mr. Ryback -- Mr. Deutsch's.

Meanwhile, ladies and gentlemen, back in New York City, what is happening during this same period? What is happening to the Richard Packing stock that's going to the fund

at this same time? Let's see how Mr. Rothman was trading Richard Packing stock and he said he took care of twenty-five percent of the shares that went through New Dimension to the funds. Let's see the independence he had. "They, Deutsch or Duboff" say to me, I'm selling them, for instance, 1,000 shares of Richard Packing at a certain price and that I should go out to a broker which they would name to me to pick up the stock at another price and, in turn, they would buy it from us at the price that they set originally. "That they set, Jaffee, Deutsch and Duboff, setting prices for New Dimension."

"Q Were there any negotiations with respect to the price between yourself and either Mr. Deutsch and Mr. Duboff?

"A No. The price was set.

"Q By who?

"A By either Mr. Deutsch or Mr. Duboff."

Does that sound familiar? Mr. Shwidock, Miss Quinn, Mr. Mazzeo? The same story. Mr. Rothman went on to describe that they, Deutsch and Duboff, would ask him to go out into the street and clean up the street, which means to buy as much Richard Packing as he could at a certain price, "And then in turn I would call them back to tell them how many shares I bought and in turn they would buy the stock from us at a price they set."

Now, who is controlling the trading of Richard

Packing stock that went through that firm? Mr. Ryback?

Finally, your Honor, andladies and gentlemen, the proof of the pudding:

What was New Dimension Securities doing with the money? What were they doing with the $100,000 that they made in the trading of one stock, Richard Packing Company? Do you remember this bill, Pincus Decorator, living room furniture, den furniture, dining room furniture, child's bedroom furniture? New Dimension Securities paid for that. Whose company is New Dimens Securities? The check, $6,200, furniture. Paintings, and now furniture.

Then we come to the town house. Now, the evidence shows that Mr. Deutsch and Mr. Duboff bought the town house, but they didn't buy it in their own name, they didn't like using their own name, so they formed a partnership called the D.F. & D.H., something like that, and they buy the stock in that partnership name, and the price is $275,000, or thereabouts, and that is all contained in the exhibits that were introduced in the black folder, Government's Exhibit 80. What do they do? They turn around and they lease, they rent the space to New Dimension Securities, and listen to the rental agreement:

From June 9, 1970 to September 30, 1970 the base rental shall be at the annual rate of $36,000 payable in equal monthly installments of $3,000 the first day of each and every

month, and then from October 1, 1970 the rent is to go up to $6,000 a month. Think about that. They never move in. They just pay rent. Money comes out of New Dimension Securities for the rent on that place and meanwhile New Dimension is at 17 Battery Place paying somebody else rent. The carpentry work for a small, little pool and a sauna bath, kitchen, bedrooms, that was the brokerage house, and that was done by Mr. Yandoli, and how was he being paid? He was being paid by New Dimension Securities' checks. Mr. Deutsch and Mr. Duboff having their town house outfitted by New Dimension Securities. Whose company is New Dimension Securities?

Finally, Mr. Frank Austin, $300,000 given to him to put the town house back in shape. Do you remember the conversation he had, he was to go to Jaffee & Company, see Jaffee's offices, and what was he told before he left? "Mr. Deutsch and Mr. Duboff told me not to mention when I got over there I had done previous work for Dimension Management. And New Dimension Securities."

Mr. Austin's testimony became more interesting as we went on, and there was a lot of humor about the document that was turned over and you saw Deutsch and Duboff and why Duetsch and Duboff didn't have a secretary to follow the instructions and they say to erase all the Deutsch and Duboffs and put in New Dimension Securities, and he wants to know why the

secretary didn't do that.

This is a question that was brought out on cross examination and this is very curious:

In 1971 that conversation in New York City -- they already wanted all the bills changed from Deutsch and Duboff-- no, excuse me, Deutsch and Duboff to Dimension Management and now they want to change it to New Dimension Securities, and he says "I was here in New York City and I changed the billings again, when I was asked to destroy all my records, change everything in my folders, and it happened in New York City, and at this time I know specifically because Mr. Deutsch gave me a whole bunch of checks for $25,000 made out in his name and he toldme he couldn't sign them but he would pay me, but he would have to get Mr. Ryback's signature because he was the one who should sign the checks."

Take some of these promises, Ladies and gentlemen, into the jury room. You will see that in fact the billing address was changed from Deutsch and Duboff to Dimension Management, at one time, and you will be able to see some of the interesting items that were purchased for this office, such as a queen-size bed, velvet striping for Mr. Deutsch's office, and it goes on and on -- a hide-a-bed -- very important English regency sideboard for $4,000 -- it goes on, thousands and thousands of dollars being paid out -- Chinese vases,

Chinese porcelain, Persian pottery. Take some of these in and look how the so called office was being furnished.

Ladies and gentlemen, there were other ways that Mr. Deutsch and Mr. Duboff profited, and Mr. Cohen. You recall the chart that was introduced to show how much Mr. Cohen received from the fact that the price of this stock was able to make this fantastic rise: Close to $400,000. Of course he did come back and inherit some money and poured money back into the company and you heard --

MR. BLOCK: I object to that, your Honor. There is no evidence he inherited any money.

THE COURT: Ladies and gentlemen, it is your recollection of the testimony. The court reporter's notes will govern.

MR. FEFFER: This came in so long ago I am sure it is very obscure in many of our minds: October 9, 1969, Stanley Duboff received for the services he had been performing 41,000 shares of Richard Packing stock. That is No. 8. Mr. Deutsch, 44,000 shares. That is on October 9, 1969.

Then, of course, we come to the options. Do you remember the testimony about people who performed services for the company and no one heard of Mr. Morginstin and Mr. Harris? You take in Government's Exhibit 6 and look through it and you see the number of shares given out and the most attractive price was $6 a share, and 5,000 goes to Mr. Morginstin and 5,000 to Mr. Harris at $6 a share. Sheila Deutsch received 2,000 and 15 option price, Rachel Duboff, Morginstin and Harris, $6 a share.

These stock options were granted and it was in the offering circular -- it was granted to key employees of the company and persons who rendered valuable services to the company. Mr. Morginstin was here and he said he never even heard of Richard Packing Company. Mr. Harris, there was a stipulation entered into to the same effect.

I wonder, really, who received these options? Mr. Morginstin was on the stand; he had no idea how much

money he had in his bank account, 50,000, maybe 150,000, he didn't know.

Mr. Harris, by stipulation, we found out that his bank account, his trading account, all the books and records were kept by Mr. Duboff, the checks were kept by Mr. Duboff. He had no idea what was going on in his account. It doesn't take much to see these two accounts were used by Mr. Deutsch and Mr. Duboff for their own purposes. The real proof of that comes when you look at the two checks, and one is contained -- the Xerox copy -- in the blank folder, for Rose Harris, for over a hundred thousand dollars for the town house, and Mr. Morginstin's check paying for the town house, $105,000.

Mr. Segal argued, of course, that this money was paid back. Let's see how it is paid back. Mr. Deutsch writes out a check to New Dimension Securities to pay the money back and out of that, $247,000, and you see that $33,000 goes to R. Duboff, goes to an account of R. Duboff, $8,000 goes to H. Duboff, $33,000 to S. Deutsch, and the balance to Mr. Harris and Mr. Morginstin.

Finally, there are two exhibits, ladies and gentlemen, which haven't been shown to you and which I wish you would take into the jury room, because if you look at these two exhibits you won't have any question

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as to the part that at least Mr. Harris played, and let me show you these. These are two letters; one is October 30, 1968, the other is October 30, 1968. In every respect they are identical, except for one thing, the signature. The Circus Wagon Master franchise rights contract, William Ward, Mondrow, Cohen, William Harris and Abe Lipman. Mr. Lipman, it came out, was a relative of Mr. Deutsch who is now deceased.

The same letter, October 30, 1968, signed Ward, Mondrow, Cohen, Deutsch, Duboff; interchangeable.

Ladies and gentlemen, we finally come to the subject of Count 4 of the indictment and it is also a part of the conspiracy, and it is the so-called Reg A, the so-called public offering.

To do this, let's look at the information, and a copy will be furnished to you in the jury room: These offering circulars were false, misleading and failed to disclose, among other things, it says, that the offering of 10,000 shares was not being made to the public but was being offered to and purchased by accounts over which the defendants Bernard Deutsch and Stanley Duboff exercised control or in which they had a beneficial interest.

Ladies and gentlemen, it doesn't take much to

see where the 10,000 shares went. I think if you just stick to -- you see Mr. Harris, Mr. Morginstin, the Denver Funds and the rest of it going into Kelly, Andrews & Bradley's trading account (indicating). Is there any question that all three, Kelly, Andrews & Bradley, the Funds, Mr. Morginstin, Mr. Harris, had a very positive relationship to Mr. Deutsch and Mr. Duboff?

The next one is that the defendants Bernard Deutsch and Stanley Duboff and co-conspirators Kelly, Andrews & Bradley and Bernard Shwidock were underwriters in the aforesaid offering and were receiving compensation. We heard a lot of testimony about what is an underwriter; Miss Appleton, you remember her being questioned about the five-year-old boy who delivered stock certificates. Well, ladies and gentlemen, Mr. Deutsch and Mr. Duboff were hardly five-year-old messengers.

Look at the profits that were being made. They were not being paid for a messenger service, a billing agent service.

3. That prior to the effective date of the offering the defendants Bernard Deutsch and Milton Cohen, the co-conspirator Bernard Shwidock, had already determined the amount of proceeds to Richard Packing at $280,000.

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Ladies and gentlemen, we have heard a lot about how the price of Richard Packing stock fluctuated, and every day you had different prices, and yet Milton Cohen says, "I would appreciate your handling of sale. We would not expect to get less than $28 per share."

That is on March 15th, to Mr. Shwidock. That is a marvelous coincidence that he happened to pick just the right figure that it went out at. You may find, as Mr. Shwidock testified, that $28 a share was set, picked and arranged by Mr. Deutsch and Mr. Duboff ahead of time. It had nothing to do with how the market would take it.

I want you to listen to Judge Ward who will instruct you as to what an underwriter is and you look at that chart and you determine whether, in fact, when men like Mr. Deutsch and Mr. Duboff direct Mr. Shwidock as to each and every one of those placements [illegible] shares, you determine then whether they were underwriting this offering.

No. 4. That Richard Packing would not offer the shares through solicitation by its directors, officers and employees as represented in the offering circular.

What officers, directors, employees made any attempt to sell those shares? Ladies and gentlemen, Mr.

Cohen could have done something very easily here. He had stockholders and he could have written to them and said, "We are having this public offering. Do you want to get some?" Did you see a press release on this? This is the most amazing part of the whole thing. This 10,000 offering is not in the Papworth and the report comes out the same time this offering is effective. It is not in a press release, Mr. O'Meara doesn't know about it, Mr. Deane doesn't know about it. No one knows about it except the people receiving the good, cheap stock.

Look in the 1969 annual report. The 1969 annual report in a letter to shareholders says Value Line and it goes into the great deals this company has, but look at that letter, and you can't even find a reference to this thing.

It is obvious why. Look who is making all the money. This was a little rip-off. Richard Packing gets $280,000; Harris, Morginstin, Kelly, Andrews & Bradley, Jaffee, Deutsch and Duboff clean up the rest.

Then the fifth one, ladies and gentlemen, that the defendants Bernard Deutsch and Stanley Duboff, in return for services to Richard Packing, were receiving compensation including Richard Packing common stock and options.

7 rmmch

We told you in the two exhibits I showed you about the 44,000 shares of stock they received and the options that Mr. Morginstin and Harris got for all the services they performed for that great viable company, and you apply the facts, not as I said them, but the facts as you recall them from the testimony, to those five listed charges in that information, and you listen to Judge Ward's instruction on the law, and, ladies and gentlemen, you don't have to draw any inferences.

Finally, with respect to that, why was Kelly, Andrews & Bradley called in by Mr. Deutsch and Mr. Duboff for that deal? Ask yourselves that. 5,000 shares go to the Funds. Why didn't Jaffee do it? 1,500 shares go to Morginstin; 1,500 shares go to Harris. What is Kelly, Andrews doing there? Very simple. Kelly, Andrews & bradley makes $4,000 on this in profit, and they make an additional $4,000 in commission, and Mr. Deutsch and Mr. Duboff, remember, get 30 percent of the profit.

How easy it is to blame Mr. Malmon. You go tell Mr. Malmon the bare facts and he says, "All right. If that is the way you are doing it, then you go ahead and do it," but did Mr. Cohen ever mention to Mr. Malmon that Mr. Deutsch and Mr. Duboff would be directing all the shares? Did Mr. Cohen ever tell Mr. Malmon that Harry

8 rmmch

Morginstin and William Harris, two relatives of Mr. Deutsch and Mr. Duboff, would be receiving those shares? Of course not. He was only told half the picture, enough to make it possible to use Kelly, Andrews & Bradley and make all that profit.

Ladies and gentlemen, I have gone through the record, and I think there are three conversations that I considered to be illustrative and crucial, and they are all statements made by Mr. Deutsch, and you reflect on these conversations and Mr. Segal, because the Government submits that they are outright admissions of the charges in this case.

Mr. Hurley says this -- you remember there was this conversation about how to split the stock, and this will show you the degree of sophistication of Mr. Hurley and how he was relying on Mr. Deutsch for the truth -- Hurley says, "He, Deutsch, said that the stock was getting ready to split and asked how it should be split, or brought up the general question of how it should be split, and I said I didn't have much preference, did it matter? He said, 'Yes, it matters how you split a stock,' and he taught me something new that I had not known before. For example, the 5 for 4 stock split means anyone who owns 100 shares,after the split they will own 120

9 rmmch

shares, whereas, for example, a 2 for 1 stock split, if you owned 100 shares before the split, you would own 200 afterwards, and he said it would be split to an odd ratio" -- in other words of the 5-4 as opposed to 2-1, that the people who owned 100 shares would own an odd number, 120 or 130, or whatever, and that what they would do is either sell those 30 shares, for example, or they would buy another 70 to round themselves out so they would have 200 shares. And here is the clincher: "In any case, it would cause activity in the stock which increases the supply and the demand at the same time."

Nice stock split. Do you remember all the stuff that if you have stock splits you can't possibly be manipulating? Listen to that testimony. Have it reread. And then the conversation this morning which Mr. Segal and others are unable to interpret.

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Remember when Mr. Hurley says he is going to get out? What happens if these mutual funds decide to stop buying? The same thing that happens if all the American consumers stop buying gasoline, the price would go way down. So when he tells Mr. Deutsch that "I am a little annoyed. I am not getting financial information. I am going to stop buying," that is a problem, because that stock is going to go way down.

That is what happened. They did stop buying in April. The stock went down. They sold it at $1 a share.

MR. SEGAL: Objection, your Honor. I object to that statement.

THE COURT: It is the jury's recollection on that matter which will govern. There are exhibits in evidence which the jury can look at and there is testimony in evidence which the jury can also look at. It is the jury's recollection in this matter which will govern.

You may sit down.

MR. FEFFER: That is what the "Couldn't he get out first" -- I wouldn't even go into that one, ladies and gentlemen. We are not going to sit here and try to imagine what he is talking about.

Mr. Leff; two more conversations. Mr. Leff.

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This takes place at the barbecue at Mr.Deutsch's house. The stock market is dropping. Mr. O'Meara says that, Mr. Ledbetter says that, and Mr. Leff is at dinner and he can't understand how come with the price of the market going down and the market in bad shape, Richard Packing is holding its own and it's going up. And he says in dinner conversation, "I mentioned in dinner conversation how remarkable it seemed to me that although the stock market was declining pretty precipitously, all the securities which Mr. Deutsch had purchased for me had maintained the price level.

"Q What did Mr. Deutsch say to you at that point?

"A He said, 'Why are you so surprised? When the supply of the stock had been dried up, you know. I had been able to place the major portion of the stock with the Denver Funds and with other Funds and when there are no shares available on the open market, it is not at all surprising that the price level could be maintained."

And finally, ladies and gentlemen, Mr. Ledbetter. And this one statement, ladies and gentlemen, tells the whole thing. He wanted to sell a stock, do you remember that, in January of 1970? He was the last witness on the direct case. Trans-America Company, the fund manager. The stock market was going down and he wanted to get out:

"I called Mr. Deutsch and told him I would like to sell my Richard Packing stock.

"Q What did he say to you?

"A Mr. Deutsch told me he thought I was making a big mistake by selling it. He said he knew where every share of the stock was. How much stock I owned" -- he knew how much stock Mr. Ledbetter owned. That was 3125 shares -- "and he said there was a Fund group that were consistent buyers of the stock in Denver and that any time the stock dipped" -- any time the stock dipped, went down -- "or he needed to place stock, he had a place for it in Denver.

"And he said he thought I was making a big mistake by selling it. And I asked the question, 'Bernie, I don't understand how the stock is staying up here with the market so weak.' Mr. Deutsch said, 'Jim, don't worry about it. The stock is going to par.

"Q What does 'par' mean?

"A Par means a hundred, in the parlance of Wall Street.

"He said not to worry about the stock, it was going to be all right."

And Mr. Robson asked him a question as to what Mr. Ledbetter thought Mr. Deutsch meant when he said all of that. And on redirect examination, he says, "What I

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understood was that the stock was -- the stock was presently well under control by Mr. Deutsch's firm. I would be silly to sell the stock at that price."

And he didn't sell, and the stock went down, down and down.

Ladies and gentlemen, there is no need to go any further. I have tried to cover with, as best I can, the testimony and the exhibits, and there may be some difference of opinion as to whether I have accurately reflected something or whether defense counsel have, and that is your obligation. If you are confused, you have a perfect right to ask for testimony to be reread and to bring those exhibits in. Exhibits like that little Regency slip, or a chart.

But, ladies and gentlemen when you give these defendants every reasonable doubt which they are entitled to under the law, you still reach the inevitable conclusion that these men are guilty as charged.

And, before closing, I should say this: It's been a long case and defense counsel and myself have been battling back and forth, but I am sure you will agree that they did a superb job on behalf of their clients, that the summations you heard today were extraordinary, they were very good. But, ladies and gentlemen, the best lawyer in the

5 elmch

world, the most articulate lawyer in the world, can't make exhibits and testimony disappear.

Finally, I think that all of you would be less than human if you didn't feel some degree of sympathy for each of the defendants on trial, but you must decide this case on the oath that you took at the outset, and that is without fear, favor and without bias or prejudice to either the Government or to the defendants. I don't want you, as Mr. Segal said, to go into that jury room scared. I want you to go in there calm and deliberate, and I want you to go through the evidence and the exhibits that are introduced in a dispassionate way, to reach a controlled decision.

In closing, ladies and gentlemen, the Government submits its case for your consideration and asks you to return a verdict of guilty as to each defendant on each of the counts. Thank you.

MR. SEGAL: Your Honor, may we come to the bench, please?

THE COURT: No. I want to excuse the jury. It's late.

Do you have anything that would require me to keep the jury at this late hour?

MR. SEGAL: Possibly, your Honor.

THE COURT: All right. If counsel wants to come

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to the bench, they may do so.

(At the side bar.)

MR. SEGAL: Your Honor, at this time I would respectfully move for a mistrial based on the closing statement that has been made by the Government.

I would point to misstatements of fact that have been made by the Government. He said selling the meat packing plant occurred almost a year after the period of the indictment; Status Marketing was never proved to have been a bankrupt; the relationship that Bass & Company entered into in early 1970 -- the Government was aware of that. They still talked about press releases. The Government introduced a new element, they talked about the victims of the purchases, these people who owned the mutual fund stock, and indicating by their statement that the loss of the Fund meant a loss to the individual purchasers. There is no proof in this entire record relating to that element, and this is not only a variance, but it is a new introduction of material that is not in the indictment.

Secondly is the reliance by the mutual funds on the representations not being a factor, the Government sought to usurp what was the function of the Judge in charging.

The next item --

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THE COURT: I must suggest that all of you took the liberty of usurping a portion of that function. I think if there is blame in that, it should be shared. I don't find it particularly the basis for a mistrial. If the government was the only one who did that of the four of you, I might have a comment, but it does seem that each of you made comments in that regard and I don't take offense at any of you having done it. Next, please.

MR. SEGAL: Next item is the fact that 20,000 shares was sold through Kelly, Andrews & Bradley and that was incorrect. There was no more than 10,000. It was a misstatement of what the record was. The next item is that there was a reference made to the $90,000 was made for services by Kelly, Andrews & Bradley. That is not in this case. I t has never been in this case. It is specifically only in this case because within the 90 there is supposed to be the 15. The government by bringing in the 90 has brought in an extra element that shouldn't have been admitted, that was admitted, that was delimited by the Court as to what its purpose was and the government brought in that.

Further, the government talks about the accountant, not talking about the 45,000 that the accountant really spoke about, but the entire 90,000, which is incorrect and not a part of the record.

MR. FEFFER: May I respond to that? I clearly said in this case and in all cases, I said listen to Judge Ward with respect to the law and I said when I mentioned Status Marketing about the $100,000, I specifically said listen to Judge Ward as to how to treat that evidence. I did it here as well.

MR. SEGAL: The government also talked about Deutsch's statements that were made to Shwidock in the course of the telephone conversation that was the subject of the recording. Not in one instance was Deutsch quoted in anything, in any of the questioning that went into that material, and yet it was commented on and it was commented on as something that Mr. Deutsch had said to Mr. Shwidock. There is as far as I understand, there is no evidence of buys and buys being related to Ryback, and yet that was commented on. If that is in there, then I stand corrected, but my recollection is as I stated.

There was no trading by Kelly, Andrews & Bradley with the funds except for the original 5,000 share offer, yet the government stated that. The next item is another misstatement but more egrievous because it flies in the face of the Government's Exhibit 50. They talk about transactions with the Morginstin and Harris stock as manipulative because the Morginstin and Harris stock was supposed to have gone to

Naddeo and Naddeo sold it to the fund. And Exhibit 50 shows that on that date, April 7th, Naddeo does not have one transaction relating to the purchase of any stock. Naddeo bought that stock and what they did with it, we don't know. But it didn't go to the fund and that is the industrial area that the government used in its summation in terms of manipulation.

It is incorrect, it is refuted by the government's own exhibit. The Allessandrini thing is the next thing with Ray Weiss. There is nothing in here about Ray Weiss as far as I know being with Allessandrini.

The next things is D.H. & D.F., the defendants Duetsch and Duboff didn't like to use their own name. There is no mystery about who it was that D.H. & D.F. were and now these individuals are being labeled with attempting to hide their interests because of the use of initials.

The last item I have is that the evidence shows thatNew Dimension Securities signed the lease and was converting that property on 38th Street to their own purposes. The government never acknowledged it and rebuts that without any basis in fact on the record. On the basis of these items and on the basis of what I consider one of the most unfair statements because of its inaccurate description of market activity and its inaccurate compilation of facts, I

respectfully move for a mistrial based on the government's summation .

MR. ROBSON: I'd like to join in the motion and add a couple of things that Mr. Segal has omitted. I think the government's statement that the co-conspirators are not before this jury and the only people that they are concerned with are the defendants in determining guilt is a misstatement which is misleading to the jury. The co-conspirators must be considered by this jury. I think it is a improper statement in addition to everything that Mr. Segal said, the testimony of Mr. Mayer was misstated. He said that Mr. Mayer said that it was improtant for traders to maintain independence. He said no such thing and the quote that Mr. Feffer referred to said no such thing, that Mr. Mayer wanted to be independent.

He never testified as an expert, that he felt that it was important for traders to be independent. Mr. Mazzeo's testimony as I recall it was not that he would not take instructions in non-trading situations. Mr. Mazzeo's testimony was solely that he objected to instructions from Mr. Duboff on the way he was trading the stock. He did not testify that Mr. Duboff was giving him instructions when they were not trading the stock. Which leave the impression that Mr. Duboff was somehow trying to control the way he felt with other people also. There was a statement that I made a

memo of which indicated the breakdown of stock was a memo of the breakdown of an interest in New Dimension Securirites. That memo does not refer to New Dimension Securities. There was n o--

MR. BLOCK: Exhibit 37.

MR. ROBSON: Whatever that exhibit number was, 37, that does not refer to New Dimension Securities nor is there testimony --

MR. BLOCK: Yes, there was.

THE COURT: I have a recollection of that.

MR. BLOCK: Hurley testified to that.

MR. ROBSON: That was New Dimension or a new broker?

MR. SEGAL: New brokerage house.

MR. BLOCK: There is nothing on the exhibit.

THE COURT: Not on the exhibit. My recollection is the same, that Mr.Hurley did testify to that.

MR. BLOCK: Yes, he did.

(PAuse.)

THE COURT: It would appear, looking at page 1906 and 1907 of the record that the recollection of Mr. Block and the Court is correct and that this was testified to by Mr. Hurley.

MR. ROBSON: It is still misstated by Mr. Feffer

in a different way because he makes it clear here that he would join New Dimension Securities and that these were percentages, whereas Mr. Feffer made it very plain that this was supposed to be the formulation of the firm and they didn't form it but took the whole thing for themselves.

The summation is so replete with half-truths and distortions, I have only picked up the most glaring ones, that I was absolutely outraged by it. I couldn't contain myself. That was the 12th note that I had when I finally stood up.

MR. BLOCK: If your Honor please, let me say something for the record. This of course is what I had in mind when I urged your Honor to adopt the new procedure that will come in effect somewhat later on. Your Honor may feel -- and I join in the motion, for the withdrawal of a juror and the declaration of a mistrial -- your Honor may feel that it is just all right to tell the jurors that it is their recollection that governs. This does not undo the damage in this kind of summation, your Honor, and I join in that motion.

Mr. Feffer talked about why didn't they issue a press release on the happening of certain things. I would ask your Honor, if your Honor is inclined to deny the motion that Mr. Segal made and we all joined in, I would ask your Honor for corrective instructions that there was no

obligation on the part of the company as a matter of law to go ahead and issue a press release, particularly since they had ended their arrangement as Mr. Segal said, with Bass & Company.

Furthermore, you know I gave your Honor a request about the business and Deutsch and Duboff designating nominees in connection with the options, Morginstin and Harris. Your Honor indicated he was refusing to give that. I think under the circumstances, and in light of the summation, I ask your Honor to reconsider that request, because I can't see where there is anything illegal about Mr. Deutsch and Mr. Duboff asking that these shares go into some relatives' names.

This has nothing to do whatsoever with that aspect under 47.

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MR. FEFFER: Your Honor, I can get the transcript or take the list and demonstrate your Honor's support for at least ninety-five percent of what I said. I checked the transcript and most of my summation was quotations from the transcript and I made a good faith effort and I would say this, your Honor:

I too felt there were numerous times when defense counsel spoke that there were misstatements, but that's beside the point now. I would be happy to go through the list Mr. Segal drew up and show you quite adequately that at least ninety-five percent of this comports with the record.

THE COURT: A good bit of what Mr. Segal objected to and what he said was not consistent with my own recollection of the testimony, and the one point we did review, just a moment or two ago, which Mr. Robson brought out, I think is indicative of the situation. We have had a long trial here. The record exceeds 5,000 pages and there are many exhibits in evidence. I am certain that none of us here have a complete mastery of this record. I haveindicated to the jury that it is the recollection of the jurors which will govern and I have indicated to them that they may have any testimony read back to them and any exhibits sent into them on request.

I think this is the best which can be done under the circumstances and therefore I deny the motion made by

Mr. Segal and joined in by Mr. Robson and Mr. Block for a mistrial.

MR. SEGAL: Your Honor, I would call the attention of the Court again to that transaction of the Morginstin and Harris stock and its use by the government as an indication of manipulation. I think it is clear from Exhibit 50 that on the day that Morginstin and Harris sold and the listing that they have as to what Naddeo did in terms of purchasing of stock, that doesn't show up on the government's list.

MR. FEFFER: I would refer you to Mr. Mazzeo's testimony with respect to that transaction.

MR. ORENSTEIN: Your Honor, you have not ruled on Mr. Block's request for the official charge.

THE COURT: The request for additional instructions made by Mr. Block are denied. I suggest, however, that if he wishes to submit additional instructions, he have them on my desk tomorrow morning at 9:00 a.m. and I will read them in written form. The oral request that you made for additional instructions, including the instructions which I have already denied, is denied again. If you wish to present any additional instructions which relate directly to anything that occurred during the course of the government's summation, please present them in writing, present them to me tomorrow morning at 9:00 a.m.

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the jury:

It is the custom in our Court that the juror seated in Seat No. 1 serve as the foreperson of the jury. In this case, Miss Short is in Seat No. 1, and she will serve as the foreperson of the jury. Her function will be to prepare any communications which you wish to make back and forth to the Court in the form of notes which you ask her to send out, and she will keep a tally as to vote, and she will be the one who will ultimately deliver the verdict in the event the jury reaches a determination in this case.

Before I begin my formal charge, I want to comment on this jury. This jury was empaneled on April 23rd and has sat through a long case and has heard much testimony. I have had opportunities to observe this jury and to comment from time to time. I would suggest that I have never seen a group of sixteen men and women who have been more devoted to their obligation and attentive to the proceedings in Court than this jury, which I have had the pleasure of working with for a period of some six weeks. You have paid attention through long days, to much testimony. I observed you as exhibits were passed among you and read to you, and I noted the careful attention which you have

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given to this most serious and important matter.

Now that you have heard the evidence and the arguments of counsel, it becomes my duty to give you the instructions of the Court as to the law applicable to this case. It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the information and the denial made by the not guilty pleas of the accused. You are to perform this duty without bias or prejudice to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

Neither are you to be concerned about the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it

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would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court, just as it would be a violation of your sworn duty as the triers of the facts to base a verdict upon anything but the evidence in the case.

As I have told you before, the evidence in the case consists of the testimony of the witnesses who appeared on the stand in this case, in the exhibits which were admitted into evidence, and in the stipulations or agreements which from time to time counsel entered into during the course of the case. Anything which was stipulated and agreed is to be accepted by you. I have said previously that the arguments of counsel in their opening statements during the course of arguing on objections and during their summations, as well as any comments which I may make during the course of my charge on the evidence are not to be considered by you unless they accord with your own recollection of the facts.

It is your recollection, and your recollection alone, of the evidence in this case which will govern and govern completely.

As I have also said, to the extent that you require your recollections to be refreshed, the court reporter has taken down all of the testimony and will, at

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your request, be available to read back portions of the testimony to you should you desire this.

Justice, through trial by jury, must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

It is the duty of the attorneys on each side of the case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections. By allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight of such evidence. You, the jurors, are the sole judges of the credibility of all witnesses and the weight of all evidence.

When the Court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely and may draw no inference from the wording of it, or speculate as to what the witness would have said if he had been permitted to answer the question.

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During the course of the trial, I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have been related.

Remember, at all times, that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your findings as to the facts.

A defendant does not have to prove his innocence. On the contrary, under our system of law, he is presumed to be innocent of the accusations contained in the information. This presumption of innocence was in his favor at the start of the trial, is in his favor even as I instruct you at this time, and remains in his favor during the course of your deliberations in the jury room.

A defendant, although accused, begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence, presented before the jury, to be considered in support of any charge against him. So, the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

As I have said, the law requires that you cannot convict unless you are satisfied of a defendant's guilt beyond a reasonable doubt.

What is a reasonable doubt? The words almost define themselves. It is a doubt founded in reason and arising out of the evidence in the case, or the lack of evidence. A reasonable doubt is such a doubt as would cause you to hesitate to act in a matter of importance in your own life. It is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experience. Reasonable doubt is not caprice, whim, or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. Speculative or imaginary doubts are not reasonable doubt.

It is not necessary for the Government to prove the guilt of a defendant to a mathematical certainty, or beyond all possible doubt. If this were the rule, few men

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or women, however guilty they might be, would be convicted. The reason is that, in this world of ours, it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence, the law is such that in a criminal case it is enough that the proof that a defendant is guilty is established beyond a reasonable doubt and to a moral certainty, not beyond all possible doubt.

If, after a fair, impartial and careful consideration of all the evidence, you are convinced of the guilt of a defendant beyond a reasonable doubt, you must convict him. If, on the other hand, after such a fair, impartial and careful consideration of all the evidence, you entertain a reasonable doubt, you must acquit him.

In the determination of innocence or guilt, you must bear in mind that guilt is personal. The guilt or innocence of each of the defendants on trial before you must be determined separately with respect to him, solely on the evidence presented against him or the lack of evidence. The case against each defendant stands or falls upon the proof or lack of proof of the charge against him, and not against somebody else.

Now, when I review the information with you,

ladies and gentlemen, I remind you, as I told you at the outset, that the information is a charge, a way the Government brings into Court individuals it claims have violated the law. But the information is not evidence of the guilt of a defendant, nor does it detract in any degree from the presumption of innocence with which the law surrounds a defendant until you, the jury, are satisfied beyond a reasonable doubt of the guilt of a defendant as charged. The sole function of the information is to define the charge against the defendant as to which the evidence at the trial must be addressed.

It must be emphasized that a defendant is not on trial for any act or conduct not alleged in the information. Consequently, you are to give no consideration whatsoever to whether or not the evidence in this case may suggest, either directly or indirectly, that a defendant may have committed offenses which are not charged in this information. Such a belief on your part cannot be permitted to influence your decision with respect to the accusations contained in the information.

The defendants, as I have indicated, have pleaded not guilty, and in doing so have put in issue every material allegation in the information, and the Government must prove each and every element of the crimes charged

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beyond a reasonable doubt. The fact that the Government is a party here, that is, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, Government and individuals alike, stand equal before the bar of justice.

Let us turn to the charges against the defendants.

Count 1 charges that the defendants, Milton Cohen, Bernard Deutsch and Stanley Duboff, together with others, conspired to violate the Securities Acts of 1933 and 1934. I shall refer to this count as the conspiracy count.

Counts 2, 3 and 4 of the information are what is known as substantive counts. They accuse the defendants of specific violations of the 1933 Securities Act.

The substantive counts and the conspiracy count, in some respects, are governed by different principles. Generally speaking, a substantive count charges a violation of the law because of the commission of a specific unlawful act. On the other hand, in a conspiracy count, the offense charged is an agreement or understanding

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of two or more persons to commit a violation of a particular statute, in this instance, the federal laws pertaining to the sale of securities.

Count 1 of the information reads as follows:

"The United States Attorney charges:

"Introduction.

"1. At all times material to this information, Bernard Deutsch and Stanley Duboff, the defendants, were registered representatives at Jaffee & Company, a New York broker-dealer registered with the United States Securities and Exchange Commission.

"2. At all times material to this information, Kelly, Andrews & Bradley (hereinafter called Kelly, Andrews), a co-conspirator, was a broker-dealer registered with the United States Securities and Exchange Commission. Bernard Shvidock, a co-conspirator, was president of Kelly, Andrews.

"3. At all times material to this information, Daniel Driesman, a co-conspirator was an attorney and a principal of Kelly, Andrews; Stuart Schiffman, a co-conspirator, was an attorney who represented Kelly, Andrews.

"4. At all times material to this information, Milton Cohen, the defendant was president of Richard

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Packing Company (Richard Packing), a company located in St. Paul, Minnesota, whose securities were traded by the investing public.

"5. Between July 1968 and March 1969, approximately 100,000 shares of Richard Packing common stock were traded on the over-the-counter market. On or about March 11, 1969, Richard Packing issued an offering circular which set forth an offer to sell an additional 10,000 shares of its common stock to the public for an amount to be determined by the market and not to exceed $300,000.

"The conspiracy.

"6. From on or about July 1968 to on or about July 1970, in the Southern District of New York and elsewhere, Bernard Deutsch, Stanley Duboff and Milton Cohen, the defendants, and Daniel Driesman, Bernard Shwidock, Stuart Schiffman, Kelly, Andrews, V. F. Naddeo, Inc., Fred Mazzeo, Allessandrini & Co., Inc., Raymond Weiss, New Dimension Securities Corporation, Stanley Ryback, Somer Jack Rothman, Jack Reiss, Hugh Deane and John Hurley, named herein as co-conspirators but not as defendants, and others to the grand jury unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit certain

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offenses against the United States, to wit, violation of Title 15, United States Code, Sections 77(q), 77(i), 77(x), Rule 256(e)(17CFR), that is, Code of Federal Regulations, Section 230.256, 78(j)(b) and 78(ff), and Title 18,United States Code, Sections 1341 and 2.

"7. It was part of the said conspiracy that the defendants and their co-conspirators, in connection with a purported public offering of Richard Packing common stock, for which offering a Form 1-A notification had been filed with the United States Securities and Exchange Commission, unlawfully, wilfully and knowingly, and directly and indirectly, would use and cause the use of the mails to transmit false and misleading offering circulars relating to said public offering.

"8. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly in the offer and sale of Richard Packing common stock, by the use of means and instruments of transportation and communication in interstate and foreign commerce, and by the use of the mails, would directly and indirectly:

"(a) employ devices, schemes and artifices to defraud;

"(b) obtain money and property by means of untrue

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statements of material facts and omissions to state facts necessary to be stated in order to make the statements, in the light of the circumstances under which they were made, not misleading;

"(c) engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon the purchasers of Richard Packing common stock.

"9. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly would devise a scheme and artifice to defraud purchasers of Richard Packing common stock and for obtaining money by means of false and fraudulent pretences, representations and promises, and for the purpose of executing such scheme and artifice, would knowingly cause mail matter to be delivered by mail according to the direction thereon.

"10. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly, in connection with the purchase and sale of Richard Packing common stock, would and did, directly and indirectly, by the use of means and instrumentalities of interstate commerce and of the mails, use and employ manipulative devices and contrivances in contra-

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vention of Rule 10(b)(5)(17 CFR 240-10b-5).

"Means of conspiracy.

"11. Among the means by which the defendants and their co-conspirators would and did carry out the conspiracy were the following:

"(a) between July 1968 and July 1970, Bernard Deutsch and Stanley Duboff, the defendants, for the purpose of causing the price of Richard Packing common stock to rise in the open market, caused accounts over which they exercised control or in which they had a beneficial interest to purchase and sell such stock so as to

"(1) restrict the available supply of said stock to the investing public, and

"(2) create the appearance of market activity and demand in said stock;

"(b) in or about October 1969, Bernard Deutsch and Stanley Duboff, the defendants, arranged with co-conspirators Bernard Shwidock and Kelly, Andrews and Daniel Driesman for co-conspirator Kelly, Andrews to trade Richard Packing stock as directed by Deutsch and Duboff for the account of Kelly, Andrews, on the condition that Kelly, Andrews pay secret kickbacks to the defendants Deutsch and Duboff, amounting to approximately 30 percent

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of the net profits received from such trades by Kelly, Andrews;

C) In accordance with the arrangements described in paragraph B above, conspirators Bernard Shvidock and Kelly, Andrews & Bradley paid to defendants Bernard Deutsch and Stanley Duboff, approximately $15,000 in secret kickbacks in the form of cash and in the form of checks to the Reiss Bank, Zurich, Switzerland.

D) On or about March, 1969, the defendants Bernard Deutsch, Stanley Duboff and Milton Cohen caused co-conspirators Bernard Shvidock and Kelly, Andrews to sell 10,000 shares of Richard Packing common stock purportedly being offered for distribution to the public to accounts over which the defendants Bernard Deutsch and Stanley Duboff exercised control, or in which they had a beneficial interest.

E) Commencing on or about March, 1969, Bernard Deutsch and Stanley Duboff, the defendants, for the purpose of causing the price of Richard Packing common stock to rise in the open market, induced certain mutual funds in Denver, Colorado, namely Financial Venture Fund, Financial Dynamics Fund, and Financial Industrial Fund, to purchase Richard Packing common stock through Jaffee & Company, a registered broker-dealer where they were registered representatives, from accounts over which they exercised control or in which they had a beneficial interest, and other accounts so as to (1) restrict the available supply of Richard Packing common

stock to the investing public, and, (2) create the appearance of market activity and demand in said stock.

F) As a result of their manipulative activities, the defendants: (1) caused the price of Richard Packing stock to rise from approximately $25 per share to approximately $53 per share, and, (2) caused the forementioned mutual funds in Denver, Colorado to suffer losses in their investments in Richard Packing of approximately 5.1 million dollars.

G) On or about March 11, 1969, Milton Cohen and Bernard Deutsch, the defendants, caused to be filed with the United States Securities and Exchange Commission a false and misleading offering circular in connection with a purported public offering of 10,000 shares of Richard Packing common stock which failed to disclosed, (1) that the offering of 10,000 shares was not being made to the public but was being offered to and purchased by accounts over which the defendants Bernard Deutsch and Stanley Duboff exercised control, or in which they had a beneficial interest; (2) that the defendants Bernard Deutsch and Stanley Duboff and co-conspirators Kelly, Andrews and Bernard Shwidock were underwriters in the aforesaid offering and were receiving compensation therefore; (3) that prior to the effective date of the offering the defendants Bernard Deutsch and Milton Cohen and co-conspirator Bernard Shwidock, had already determined the

amounts of proceeds to go to Richard Packing at $280,000, having falsely stated in the offering circular that the proceeds to Richard Packing would be determined by the market and could be as high as $300,000. (4) That Richard . would not offer the shares through solicitation by its directors, officers and employees, as had been stated in the offering circular. (5) Thatthe defendants Bernard Deutsch and Stanley Duboff, in return for services to Richard Packin including the instant offering, had received in the past and would receive in the future, compensaion, including Richard Packing common stock and stock options.

B) In or about March, 1969, the defendants and co-conspirators caused the false and misleading offering circular filed with the United States Securities and Exchange Commission to be mailed to various persons." There follows a series of six overt acts which I will read later in my charge, ar to which I will refer in a few moments. Following the six overt acts, there is a reference to Title 18, United States Code Section 371.

That completes my reading of Count 1 except for the overt acts which are alleged to have been performed in furtherance of the conspiracy and to effect the objectives thereof. Those acts, as I say, will be read by me later in my charge. The conspiracy charge I have just read to you is entirely separate

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and distinct from the charges made in the substantive counts that is, counts 2, 3, and 4, which I shall discuss later.

The fact, however, that the conspiracy count is separate from the substantive counts does not preclude you or prevent you from considering any proof as to those charges as evidence that a conspiracy existed.

Count 1 charges that part of the conspiracy was to violate Section 17 of the Federal Securities Act of 1933; the so called Antifraud provision of the 1933 Act.

In addition, Counts 2 and 3, which I will read later, charge the defendants, Milton Cohen, Bernard Deutsch and Stanley Duboff with violations of this statute. Section 17A of the Securities Act of 1933 reads in pertinent part as follows:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of mails directly or indirectly, (1) To employ any device, scheme or artifice to defraud, or, (2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made not misleading or, (3) To engage in any transaction, practice or course of

business which operates or would operate as a fraud or deceit upon the purchaser."

As you can see, the substance of these provisions are that it is unlawful in the offer or sale of a security to employ the mails or other means of interstate commerce or interstate communication in furtherance of any fraudulent or deceitful scheme, practice or course of business, or in any attempt to obtain money through material misrepresentations or through omissions of a material fact which would be necessary to make the information given not misleading. And such conduct is declared to be unlawful by the Securities of 1933.

False representations mean any representations regarding present or past facts, any opinion expressed or any predictions as to the future which are not made in good faith or which are made in reckless disregard or indifference as to whether the sratements are true or false. For example, the government contends that Bernard Deutsch and Milton Cohen, through oral statements and press releases, made false statements and omitted to state material facts as to the number of franchises sold.

It is the government's contention that these statements were not only false, but also that they were misleading in that they omitted to state material facts

necessary to make the statement not misleading:

A/ Thus, the government contends, that the press release of April 6, 1970, Government's Exhibit 31C, which states in part that Richard Packing had sold 210 franchises by that date, was false, because the company had sold a smaller number. The government also contends that this statement was misleading because it omitted to state that a number of franchises had by that time been cancelled.

The government also contends that the statement was misleading because it did not state that as of this time the franchise operation was losing money. The government made other contentions, which I will leave to your recollection.

The defendants contend that they believed the statements they made as to the number of franchises sold to be true, and that the so called projections, that is, as to the future earnings of the company, were mere estimates.

If you find that the defendants believed the statements they made as to the number of franchises sold to be true, and that the projections as to future earnings were made in good faith, you cannot find any criminal intent in the making of these statements, even if the figures later proved to be wrong. 1A

Count 1 of the information also charges that one

purpose of the conspiracy was to violate Section 78J (B), the artifraud provision of the Securities Exchange Act of 1934. This section provides in pertinent part as follows:

"It shall be unlawful for any person directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails, (b) to use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as," and then I interpolate, "Securities and Exchange Commission, as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10B-5 which you heard me mention before, promulgated by the Securities and Exchange Commission under the aforementioned section of the statute, reads as follows:

"It shall be unlawful for any person directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails:

"(1) To employ any device, scheme or artifice to defraud.

"(2) To make any untrue statement of a material

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fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, or,

"(3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security."

Count 1 charges a conspiracy to violate the Federal Securities Laws. What are the essential elements of conspiracy? In order for you to find a defendant guilty of conspiracy, you must find that the government has established the following essential elements beyond a reasonable doubt:

First, the existence of the conspiracy as charged in the information. That is, that some time between July, 1968 and July, 1970, a conspiracy existed to commit fraud in the purchase and sale of Richard Packing Company stock.

Second, that a particular defendant knowingly and wilfuly became a member of the conspiracy, and third, that at least one of the overt acts, which as I say I will read shortly, charged in the information, was committed in furtherance of the conspiracy by at least one of the alleged co-conspirators.

If the government fails to establish any of these elements beyond a reasonable doubt as to any particular

defendant, you must find that defendant not guilty.

On the other hand, if the government has proven all of the elements beyond a reasonable doubt as to such defendant, you must find him guilty.

Now, what is a conspiracy? A conspiracy is a combination, agreement, or understanding of two or more persons designed to accomplish a criminal purpose by concerted action. The gist of the crime of conspiracy is the un- combination or agreement to violate the law.

A conspiracy has been described as a partnership in crime, in a criminal purpose, in which each member becomes the agent of every other member. To establish a conspiracy the government is not required to show that two or more persons sat around a table and entered into a solemn pact orally or in writing, stating that they formed a conspiracy to violate the law. Indeed, it would be extraordinary if there ever was such a form of document or specific oral agreement

From its very nature, a conspiracy is almost always characterized by secrecy, rendering its detection difficult. Your common sense will tell you that when persons undertake to enter into a criminal conspiracy, much is left to unexpressed understanding.

Thus express language or specific words are not

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required to indicate consent or attachment to a conspiracy.

It is sufficient if two or more persons in any manner, through any contrivance, impliedly come to a common understanding to violate the law. In determining whether or not the proof establishes that the conspiracy charged in the information actually came into existence, you should consider all of the evidence which has been admitted with respect to the conduct, acts and declarations of each alleged conspirator, and you may make such inferences as may reasonably be drawn therefrom.

The period of time charged in the information as the time of the conspiracy runs as I have indicated from on or about July, 1968 to on or about July, 1970. It is not necessary for the government to prove that the conspiracy started and ended on those specific dates. It is sufficient if you find that in fact a conspiracy was formed and existed for some substantial time within the period set forth in the information, and that at least one overt act was committed during this period.

In this connection, it is not necessary for you to find that the conspiracy was successful. A conspiracy is basically an agreement to violate the law and may exist even though its final objectives were never accomplished.

You may find that the existence of the conspirac

has been established if, from proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that at or about the time alleged, namely from on or about July, 1968 to on or about July, 1970, at least two of the alleged co-conspirators came to a common understanding or agreement to carry out one or more of the criminal acts charged in the information.

Bear in mind that you need not find that it was the defendants' intention to accomplish all of the allegedly illegal purposes described in the information. One illegal purpose is enough.

If you are satisfied beyond a reasonable doubt that the conspiracy charged existed, you must ask yourselves:

Who participated in it? In determining whether a defendant was a member of the conspiracy, you should consider whether on all the evidence he knowingly and purposefully entered the conspiracy.

In determining whether a defendant became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose. That is, did he join with the awareness of at least some of the basic aims and purposes of the conspiracy.

It is important for you to understand that mere

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association with alleged co-conspirators does not establish a defendant's participation in the conspiracy, even if you find one did exist. So too, mere knowledge by a defendant of the conspiracy, or any illegal act on the part of an alleged co-conspirator is not sufficient to establish membership in the conspiracy.

To find a defendant guilty of a conspiracy, you must find that he knowingly and wilfuly joined the conspiracy with the specific intent and purpose of furthering its objective. Did he intend to join that conspiracy, have a stake in its outcome, and make it his own? How do you determine that? An act is done knowingly and wilfully if it is done voluntarily and purposefully. An act is done wilfuly and unlawfully if it is done with evil motive or purpose. Knowledge and intent exists in the mind.

Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable

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or ordinary consequences of his acts.

Direct proof of intent is not necessary. In fact, rarely is direct proof available that one had knowledge of a fact or intended to bring about a result. Now and then a person may commit himself in writing or make a statement in which he concedes that as of a certain time he had knowledge of a fact and that he acted with a specific intent to achieve a specific result. But of course that is rare and is the exception, rather than the rule.

The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts than by words or explanation of the act long after its occurrence.

Frequently, the acts of individuals speak their intentions more clearly than do their words. One might apply the old adage, "Actions speak louder than words." Accordingly, intent, wilfulness and knowledge are usually established by surrounding fact and circumstances, as of the time acts occurred or events took place, and the reasonable inferences to be drawn therefrom. This is referred to as circumstantial evidence, and I will define it a little later in my charge, and if believed, is as acceptable as direct evidence.

You should apply your common sense and draw such reasonable inferences as may be warranted by facts proved to

your satisfaction.

In determining these issues, you may consider any statements made and acts done or omitted to be done by the accused, together with all other facts and circumstances in evidence which reasonably relate to a determination of state of mind.

The guilt of a conspirator is not governed by the extent or duration of his participation or whether he had knowledge of all the operations. Thus, if you are satisfied beyond a reasonable doubt the conspiracy charged existed and that a defendant knowingly participated in it, the extent or duration in its participation has no bearing on his guilt or innocence. Even if he participated in it to a degree more limited to that of his co-conspirators, he is equally culpable, so long as he was in fact a conspirator.

Before we come to the last element which must be proved in a conspiracy charge, which is the element of overt acts, there is another principal of law which you should bear in mind. I have already told you that when people enter into a conspiracy to accomplish an unlawful purpose, they become agents for each other in carrying out the conspiracy. Hence, the acts or declarations of one in the course of the conspiracy and in furtherance of it are deemed to be the acts of all of them, and all of them are responsible for such acts.

Accordingly, if you find in accordance with these instructions that the alleged conspiracy existed and that two or more people participated in it, an act done and statements and declarations made in furtherance of the conspiracy by any persons found by you to have been members of the conspiracy may be considered against any defendant found to be a member, even though such acts or declarations were made in the absence and without the knowledge of that defendant.

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It is important to note that this principle applies only to acts and declarations done or made during the continuance of the conspiracy and in furtherance of the conspiracy, that is, to carry out an unlawful objective or purpose of the conspiracy. Thus, if you find that a conspiracy existed and that a defendant participated in it, then you may consider the acts and statements of all of his co-conspirators to carry out the conspiracy as evidence against that defendant even though he may not have been present.

If you find beyond a reasonable doubt that there was a conspiracy and that a defendant was a member of the conspiracy, you must consider whether or not one of the alleged conspirators committed overt acts charged in the information in furtherance of the conspiracy.

The overt acts charged in Count 1 of the information are as follows:

"Overt acts. In furtherance of said conspiracy and to affect the objectives thereof, the defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York:

1) On or about March, 1969 the defendant Stanley Duboff caused Kelly, Andrews to enter an order to purchase Richard Packing common stock.

2) On or about March 5, 1969, the defendant Milton

Cohen caused a letter to be mailed to co-conspirator Bernard Shwidock.

"3) On or about March 14, 1969, co-conspirator Kelly, Andrews purchased 1,000 shares of Richard Packing common stock.

"4) On or about March 18, 1969, the defendant Bernard Shwidock caused Jafee & Company to purchase 5,000 shares of RichardPacking Company common stock for Financial Venture Fund.

"5) On or about March 25, 1969 Kelly, Andrews issued a check.

"6) Each of the mailings alleged in Counts 2 and 3 of this information," which I will read shortly, "are repeated and realleged as if fully set forth as overt acts."

As I indicated before, at the bottom of the count there appears the following:

"(Title 18 United States Code, Section 371)."

The offense of conspiracy is complete when the unlawful agreement is made and any overt act is done by a co-conspirator to effect the objectives of the conspiracy. An overt act is merely something that is done to further the objectives of the conspiracy. It need not be a criminal act in itself or an act which of itself constitutes an object of the conspiracy. It may be an act which is innocent on

face, but it must be of such character that it furthers or promotes or aids and assists in accomplishing a purpose of the conspiracy. It is not necessary for the government to prove that each member of the conspiracy committed or participated in a particular overt act since the act of any one done in furtherance of the conspiracy becomes the act of all the members.

It is enough if it proves the commission of at least one of the overt acts at or about the time alleged. It need not have occurred at the precise time or the precise place alleged in the information. It is sufficient if you find that in fact a conspiracy was formed and existed for some substantial time within the period set forth in the information and that the overt act was committed during that period, that is, the period during which you find the conspiracy was in existence.

To sum up, in order to prevail against a defendant under the conspiracy count, the government must establish beyond a reasonable doubt the existence of an unlawful agreement, that the defendant knowingly and wilfuly associated himself with the conspiracy, and that the overt act in furtherance of the conspiracy was committed.

The defendants contend here that the government has failed to prove a conspiracy. Alternatively, they contend

that at best the government has proved separate conspiracies involving various of the defendants. Proof of several separate and independent conspiracies is not proof of the single overall conspiracy as charged in the information and if you find that the government has failed to prove the existence of only one conspiracy, you must find the defendants not guilty.

In determining whether there was a single, overall conspiracy, you may consider what the evidence shows as to changes of personnel and activity. You may find a single conspiracy, even though there were changes in personnel and activity, provided you find that some of the conspirators continued throughout the life of the conspiracy and that the purposes of the conspiracy continued to be those charged.

The fact that the parties are not always identical doesn't mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants, the conspiracy would be the same basic scheme, even though in the course of its operation additional conspirators joined in and performed additional functions to carry out the scheme while others were not active or had terminated their relationship.

On the other hand, if you find that one overall

conspiracy terminated and another was formed, you may not find a single conspiracy even though the purposes of both conspiracies were the same and that some of the defendants weremembers of both. In essence, the question is, what is thenature of the agreement? That is for you to determine after examining all the evidence.

You have heard testimony with respect to an alleged indirect interest or control exercised by the defendants Deutsch and Duboff in New Dimension Securities Corporation. The question of the propriety of any such interest or control is not before you and should not be considered by you.

The evidence was admitted primarily to establish that by the use of that alleged control of interest, defendants manipulated the price of the stock of Richard Packing. If you find that New Dimension Securities Corporation did nothing more than execute orders received from Jaffee & Company on which a normal profit was made and that the defendants did not conspire to raise or maintain the price of the stock, then you are to ignore all the evidence with respect to their relationship with New Dimension Securities Corporation.

It is the government's contention that as part of the conspiracy defendants, through the exercise of control over Kelly, Andrews & Bradley, manipulated the price of

Richard Packing stock. In order to find that the governme has established this portion of its charge, you must find that there was an agreement between Bernard Showidock and these defendants to create buying activity in the stock of Richard Packing in order to raise or maintain the price and thereby induce others to buy the stock. The mere fact that defendants arranged for transactions to be handled chrough Kelly, Andrews & Bradley is insufficient in and of itself to support a charge of manipulation.

If all defendants were doing was arranging for the purchase or sale of stock on behalf of interested buyers or sellers with no intention to control the price of that stock, you may not find that this activity constituted a manipulation.

I now turn to the substantive counts.

Counts 2, 3 and 4 charge the defendants with having actually violated the Securities Act of 1933 as distinguished from merely agreeing to violate the law.

I shall read Counts 2, and 3, to you. I would state, at the outset, that they are considerably shorter than Count 1.

Count 2: "The United States Attorney further charges,(1) From on or about March 11, 1969 to on or about July, 1970 in the Southern District of New York, Bernard

Deutsch, Stanley Duboff and Milton Cohen, the defendants, unlawfully, wilfuly and knowingly in the offer and sale of securities, to wit, Richard Packing common stock, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails directly and indirectly, (A), did employ devices, schemes and artifices to defraud, (B), did obtain money and property by means of untrue statements of material facts and omissions to state facts necessary to be stated in order to make the statements made in the light of the circumstances under which they were made not misleading and, (C), did engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers of said securities.

"2) The allegations contained in paragraph 11 of Count 1 of this information are repeated and realleged as though fully set forth herein as constituting and describing offenses charged in Count 2."

I assume that defense counsel are agreeable to my not rereading the allegations contained in paragraph 11 of Count 1 of the information. Is that correct, gentlemen? Mr. Block? Would you want me to read that again?

MR. BLOCK: I'm sorry, your Honor, I was reading--

THE COURT: Mr. Reporter, please read the last comment I made then.

(Record read back by the reporter.)

MR. BLOCK: I agree, your Honor.

MR. SEGAL: I agree, your Honor.

MR. ROBSON: I agree, your Honor.

THE COURT: Thank you, gentlemen.

"3) On or about the dates hereinafter set forth in Count 2, in the Southern District of New York, said defendants did use the mails by causing to be delivered by mail mail matter hereinafter set forth according to the direction thereon to the addressees hereinafter set forth:"

And then we have a list of addressees, dates and matters, and I will read first the name of the addressee, then the matter:

"Kelly, Andrews & Bradley, 111 John Street, New York, New York 10038, Attention Bernard Shwidock. Dat 3/5/69. Matter: letter.

"Richard Packing, 1525 North Concord Street, St. Paul, Minneapolis, 55075, date , 3/14/69, matter: Confirmation.

"Richard Packing, 153 North Concord Street, South St. Paul, Minneapolis, date 3/18/69, matter: Confirmation.

"Richard Packing, 153 North Concord Street, South St. Paul, Minneapolis, dated 3/18/69, confirmation.

"Financial Venture Fund, P.O. Box 2040, Denver, Colorado, 80201, date, 3/18/69, matter: Confirmation.

"Financial Venture Fund, P.O. Box 2040, Denver, Colorado, 80201, date 3/25/69, matter: Confirmation.

"Financial Venture Fund, P.O. Box 2040, Denver, Colorado, 80201, date 3/25/69, matter: Confirmation.

"Harry Morginstin, 10 Avenue P, Brooklyn, New York, date 4/3/69. Matter: Confirmation and offering circular.

"William Harris, 2418 Brigham Street, Brooklyn, New York. Date 4/3/69. Matter: Confirmation and offering circular.

"Richard Packing, 1525 North Concord Street, St. Paul, Minneapolis, date 4/4/69. Matter; Confirmation.

"Richard Packing, 1525 North Concord Street, St. Paul, Minneapolis, date 4/4/69. Matter: Confirmation.

"Harry Morginstin, 10 Avenue P, Brooklyn, New York, date 4/7/69. Matter; Confirmation.

"William Harris, 2418 Brigham Street, Brooklyn, New York. Date 4/7/69, matter: Confirmation.

"(Title United States Code, Sections 770 and 77X, Title 18, United States Code, Section II.)"

I will now read count 3 and I will assume that the defense counsel do not wish me to reread the allegation.

contained in paragraph 11 of Count 1 which are again repeated and realleged in Count 3.

"Count 3: The United States Attorney further charges, (1) From on or about March 11, 1969 to on or about July, 1970, in the Southern District of New York, Bernard Deutsch, Stanley Duboff and Milton Cohen, the defendants, unlawfully, wilfuly and knowingly in the offer and sale of securities, to wit, Richard Packing common stock, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, (a) did employ devices, schemes and artifices to defraud, (b), did obtain money and property by means of untrue statements of material facts and omissions to state facts necessary to be stated in order to make the statements made in the light of the circumstances under which they were made not misleading and, (c) did engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers of said securities.

"2) The allegations contained in paragraph 11 ofCount 1 of this information are repeated and realleged as though fully set forth herein as constituting and describing offenses charged in Count 3.

"3) On or about the date hereinafter set forth in Count 3 in the Southern District of New York, said

defendants did use the mails by causing to be delivered by mail, mail matter hereinafter set forth according to the direction thereon to the addressee hereinafter set forth.

"Addressee, Financial Dynamics Fund, Inc., Box 480, Denver, Colorado, 80201. Date: 11/6/69. Matter: Confirmation (Title 15, United States Code, Sections 77Q and 77X; Title 18, United States Code, Section 2.)"

Let me at the outset clarify certain things. In the first place, there is nothing illegal about selling securities. It is only when false and/or fraudulent statements are made in connection with the sale of securities that we run into a violation of federal law. In determining whether a false or fraudulent statement has been made as to any material fact to induce people to buy securities, you must consider the evidence with respect to the particular defendants and see whether the government has established beyond a reasonable doubt that that particular defendant or those particular defendants participated in the fraud in violation of the law.

Section 77Q of Title 15, to which I have made reference and which is cited at the end of counts 2 and 3, refers to "any security." You are instructed as a matter of fact thatthe common stock of Richard Packing Company is a security within the meaning of the statute.

To convict a defendant under Counts 2 and 3, or either of them, you must find that three elements exist. First, that the particular defendant who you are considering in connection with the sale of Richard Packing Company stock engaged in a scheme to defraud or to obtain money and property by means of untrue statements of material facts or by means of omissions to state material facts necessary in order to make his statements not misleading.

2) That the particular defendant you are considering, and you must consider each defendant separately, did so wilfully and knowingly.

3) That that defendant who you are considering used or caused to be used the mails or means of communication in furtherance of the scheme. A scheme to defraud includes any plan by which one seeks to obtain money or property from another by means of representations as to a material fact which are false and untrue. Such representations may be made in two ways:

First, by statements of material facts that are just not true and, second, by the omission from what is said of material facts which are necessary to make what is said truthful.

In other words, once having undertaken to state a fact or facts, there is an obligation on the one who does so

not to give such a distorted picture of them as to make the statement misleading concerning what the actual facts really are. A half truth may be a misrepresentation and fraudulent misrepresentations may be affected by half truths if they are calculated or intended to mislead. Having chosen to speak, there is an obligation to state all the facts which are necessary to a proper understanding of the particular subject matter which is being covered. A statement although literally true is nevertheless false if when interpreted in the light of the effect it would produce on the minds of those whom was calculated to influence, it would create a false impression of the true state of affairs.

Of course, such facts whether affirmative false statement or omissions of facts necessary to portray a true picture of what the facts really are must be material. By "material" I mean simply facts which could reasonably be expected to induce a person to decide whether to act or not act and, in this case, to purchase or not to purchase stock of Richard Packing Company. Material facts include those which affect the possible future of the company and those which may affect the desire of investors to buy, sell or hold the company's securities.

It is not necessary for the government to establish that anyone relied on or suffered damage as a consequence of

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any false statements or omissions of material facts. It is enough that false statements or statements omitting material facts should be made in the expectation that they would be relied upon.

The information charges that the defendants engaged in transactions, practices and courses of business which operated as a fraud upon the purchasers of Richard Packing common stock. In order for you to find each of the defendants guilty of this charge, it is necessary for you to find that the facts concerning manipulation were to be concealed from these purchasers of Richard Packing common stock.

It is not important whether or not the particular marketing practices which were concealed were legal. The crucial question here is not the illegality of the practice, but the agreement to conceal them from the customer, in this case Financial Venture Fund, Financial Dynamics Fund and Financial Industrial Fund. The manipulators design in supporting prices is to create the impression that a free market is supplying demand whereas the demand in fact is coming from his planned purpose to prevent the buyer from becoming aware o its true value. If you find the price of Richard Packing common stock was manipulated and there was a failure to disclose such alleged manipulation to the three Denver mutual

funds which bought their shares from Jaffee & Company, you may find that this failure to disclose was a misrepresentation of a material fact, i.e., the true price of the stock. There has been some testimony before you to the effect that a number of people, including some of the defendants, believed the price of Richard Packing stock would go up.

I instruct you that such a belief, if it existed, is not relevant to the crime charged here. If you find that there were manipulative practices which were not disclosed to purchasers of Richard Packing Company common stock you may find such sales are part of a fraudulent scheme, even if you find that some or all of the participants in the scheme believed that the customers would make money from a rise in the price of Richard Packing stock.

I instruct you that regardless of what ultimately happened to the price of the stock, whether it went up or down, you should not be concerned with it.

The second element which you must find in order to convict under Counts 2 and 3 is the element of intent. An intent to commit a fraud or to mislead is an essential element and without such an element you cannot convict a defendant on either Count 2 or Count 3.

The third element of the offense charged in these counts is the use of the mails. In order to constitute a

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violation of the statute, the use of the mails must be in furtherance of the scheme to defraud. It is not necessary for the government to prove that a defendant actually received or placed in the mail any of the matter specified in the information.

(Continued on the next page.)

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It is sufficient for the Government to prove that a defendant caused a mailing to be made in the ordinary course of business, which mailing was made in furtherance of the scheme. If a defendant took steps which he knew or could reasonably have foreseen at the time would naturally and probably result in the use of the mails, then he has caused the mails to be used, and it is sufficient if the items charged in the information were mailed by an agent of the defendant or by someone who relied upon the defendant's representations in furtherance of the scheme to defraud. Nor is it necessary that the Government prove as to each defendant that he know of or participated in the mailing of the various items set forth in the relevant counts of the information.

In fact, it is not necessary for the Government to prove that a defendant knew or should have foreseen that the mails would be used in sending the confirmations listed in Counts 2 and 3. The mails are included in the statute basically and primarily as a ground for federal jurisdiction.

An example of such a mailing is the mailing by brokers of confirmations of purchases or sales made by or for the accounts of the person named in this information. The fact that a broker would use the mails to send

confirmations is sufficient.

You will note that Count 2 of the information charges a total of thirteen separate mailings. In order to find a particular defendant guilty under this count, it is necessary that you find, in addition to the other essential elements that I have outlined, that one of the mailings set forth in Count 2 took place in furtherance of the scheme to defraud.

Count 4 of the information charges the defendants with having violated Section 77j of the Securities Act of 1933 and Title 17, Code of Federal Regulations, Section 230.256. These provisions make it a crime to unlawfully, wilfully and knowingly use and cause the use of the mails directly or indirectly to carry and transmit an offering circular containing materially false and misleading statements as to which offering circular and notification on Form 1a has been filed with the Securities and Exchange Commission.

I will read now from Count 4 of the information. Count 4 reads as follows:

"The United States Attorney further charges:

"On or about March 11, 1969, in the Southern District of New York, Bernard Deutsch, Stanley Duboff and Milton Cohen, the defendants, unlawfully, wilfully and

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knowingly did directly and indirectly use and cause the use of the mails to carry and transmit false and misleading offering circulars for a public offering of Richard Packing common stock, as to which a notification on Form 1a had been filed with the United States Securities and Exchange Commission; these offering circulars were false and misleading in that they failed to disclose

"1. that the offering of 10,000 shares was not being made to the public but was being offered to and purchased by accounts over which the defendants Bernard Deutsch and Stanley Duboff exercised control or in which they had a beneficial interest;

"2. that the defendants Bernard Deutsch and Stanley Duboff and co-conspirators Kelly, Andrews and Bernard Shwidock were underwriters in the aforesaid offering and were receiving compensation therefor;

"3. that prior to the effective date of the offering, the defendants Bernard Deutsch and Milton Cohen and co-conspirator Bernard Shwidock had already determined the amount of proceeds to Richard Packing as $280,000, having represented in the offering circular that the proceeds to Richard Packing would be determined by the market and could be as high as $300,000;

"4. that Richard Packing would not offer the

shares through solicitation by its directors, officers and employees as represented in the offering circular;

"5. that the defendants Bernard Deutsch and Stanley Duboff, in return for services to Richard Packing, were receiving compensation including Richard Packing common stock and stock options.

"2. The addressees to whom envelopes containing the above described offering circular were mailed are those identified in Counts 2 and 3 of this information which are incorporated herein as if fully set forth."

I assume counsel do not want me to read the addressess who are identified in Counts 2 and 3 of this information, is that correct?

MR. BLOCK: That is correct, your Honor.

MR. SEGAL: Yes, your Honor.

MR. ROBSON: Yes, sir.

THE COURT: I havenow reached the point in the information where it closes with "(Title 15, United States Code, Section 77j and 77x; Title 17, Code of Federal Regulations, Section 230.256; Title 18, United States Code, Section 2)."

This is signed Paul J. Curran, United States Attorney.

Congress in 1933, at the depth of the depression,

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felt that many securities had been sold through fraudulent representations and passed a law known as the Securities Act of 1933, which provided, in effect, that before securities could be sold through the mail or through instruments of interstate commerce, such as the telephone, the person selling the securities would have to file, in certain situations, a registration statement, and where the offering was in a smaller amount, as here, an offering circular, with the Securities and Exchange Commission. The offering circular had to contain certain information which was designated by law.

In this case, the offering circular which is in evidence contains sections entitled "Offering Plan," "Price Range of Common Stock," "History in Business," "Application of Proceeds," "Management and Stock Ownership," "Stock Options and Warrants," "Underwriting," as well as "Financial Statements," and so forth. The law also provided that each prospective purchaser should be furnished with a prospectus giving this type of information.

The idea was that there should be truth in the sale of securities and that prospective purchasers should be acquainted with the facts relating to the securities.

In order to find a defendant guilty under

Count 4, you must find the following beyond a reasonable doubt:

First, that such defendant in connection with a public offering of Richard Packing common stock as to which a notification on Form 1a had been filed with the Securities and Exchange Commission, directly or indirectly, transmitted a false and misleading offering circular which contained one or more untrue statements of material facts or which omitted to state material facts necessary in order to make the statements in the offering circular not misleading, or that such defendant did aid or abet another in the above;

Second, that the defendant did so wilfully and knowingly; and

Third, that the person directly or indirectly used or caused the use of the mails to carry and transmit the Richard Packing offering circular which is alleged to be false and misleading.

The language describing the basic elements of the offenses set forth in Count 4 has been explained to you in connection with the earlier portion of my charge.

The Government's Exhibit 5, which is in evidence, is a file of the Securities and Exchange Commission which contains a notification on Form 1a. However, I charge you

that in order to find any defendant guilty on Count 4, you must find as one of the elements beyond a reasonable doubt that the notification on Form A had been filed with the Securities and Exchange Commission.

Regarding that fact, you recall the testimony which was presented earlier in the case on that subject.

You will recall that one of the allegations set forth in Count 4 is that the March 1969 offering circulars for a public offering of Richard Packing Company stock were false and misleading in that they failed to disclose that the defendants Bernard Deutsch and Stanley Duboff and co-conspirators Kelly, Andrews & Bradley and Bernard Shwidock were underwriters in the aforesaid offering and were receiving compensation therefor. Under the federal securities laws, an underwriter is someone who purchased Richard Packing Company common stock from Richard Packing Company in the 10,000 share Regulation A public offering in March 1969 with a view to distributing that stock, or who sold Richard Packing stock as part of the Regulation A distribution in March 1969, or someone who participated directly or indirectly in the underwriting of the 10,000 shares sold in the March 1969 Regulation A public offering.

In order to be classified as an underwriter with

respect to particular Richard Packing Company shares acquired by him, the person or firm must have purchased them for the purpose of distributing them to the public. If the person or firm acquired shares for other reasons, such as investment or speculation for profit, without the intent of making a public distribution of them, then that firm or person is not an underwriter, and the requirements of an offering circular do not apply to him if he later decides to sell the shares, even though his later sale may be in fact a public distribution.

You must, therefore, focus your attention on the purpose for which the person acquired the shares, whether for public distribution or for other reasons, in deciding whether he is an underwriter and therefore subject to the requirements of the federal securities laws. Of course, a person or firm may acquire Richard Packing Company shares at different times for different purposes. A person or firm may thus be an underwriter as to certain securities of Richard Packing Company but not as to others.

The Government contends that the defendants Deutsch and Duboff, and co-conspirators Kelly, Andrews and Shwidock, in selling and distributing and in participating in such sale and distribution of the Richard Packing Company stock in the offering of 10,000 shares in March 1969,

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acted as underwriters in the March 1969 offering.

The defendant Cohen, in connection with the presentation which he made, claims that he is not guilty of wilful wrongdoing because he acted on the basis of advice from his attorney. If a defendant, before taking any action, sought the advice of an attorney whom he considered competent, in good faith and for the purpose of securing advice on the lawfulness of his possible future conduct, and made a full and accurate report to his attorney of all material facts of which he has the means of knowledge, and acted strictly in accordance with the advice of his attorney given following his full report of all facts to his attorney, then a defendant would not be wilfully doing wrong or omitting something the law forbids or requires as that term is used in these instructions.

Whether a defendant acted in good faith for the purpose of seeking guidance as to the questions about which he was in doubt and whether he made a full and complete report to his attorney and whether he acted strictly in accordance with the advice received, these are all questions for you to determine.

This instruction applies to the issue raised by the Government's allegation that the offering circular,

which I believe is Government's Exhibit 5-A in evidence --

MR. BLOCK: I think it is 5-B, your Honor.

THE COURT: I'm sorry.

-- 5-B in evidence, was misleading and that the Form 2a, which would be Government's Exhibit 5-C in evidence, was misleading.

The testimony of Mr. Malmon on that subject is before you for consideration, and I charge you that if you find that any errors or omissions in the offering circular, Government's Exhibit 5-B, or the Form 2a, Government's Exhibit 5-C, were errors or omissions on the part of Mr. Malmon alone, then you cannot find that the defendant Cohen was responsible in any way for any misleading statements or omissions.

Generally, the proof offered is of objective facts and circumstances from which one, in terms of common experience, can rationally and logically conclude the ultimate fact. Accordingly, consideration of all the facts and circumstances established by the evidence, together with the exhibits, may permit a reasonable inference with a fair degree of accuracy as to the defendant's intentions at the time he gave his testimony.

Proof of falsity of one's statements may be through the testimony of any number of witnesses. Thus,

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the testimony of one witness, if believed by you, is sufficient to establish an alleged false declaration.

There has been some reference to the motive of the defendants to violate the laws which they are charged with violating. I charge you that proof of motive is not a necessary element of the crimes with which the defendants are charged. Proof of motive doesn't establish guilt nor does want of proof of motive establish that a defendant is innocent. If the guilt of a defendant is shown beyond a reasonable doubt, it is immaterial what the motive for the crime may be or whether any motive may be shown, but the presence or absence of motive is a circumstance which you may consider as bearing on the intent of the defendant.

During the course of the testimony of Bernard Shwidock, evidence was admitted that the defendants Deutsch and Duboff were to receive or did receive certain cash and checks from Kelly, Andrews & Bradley.

I charge you that this evidence is to be considered by you only as a possible motive in determining whether or not there was a manipulation or fraud in the sale of securities.

You are not to consider the question of whether or not such payments were proper. It is the Government's

position that these payments were the means by which Deutsch and Duboff would profit from a manipulation and from a fraud in the sale of securities.

Unless, therefore, you find the existence of a manipulation or fraud in the sale of securities through the use of Kelly, Andrews & Bradley, you are to disregard this testimony.

You have heard testimony with regard to the purchase by the Value Line Fund in a private transaction of 50,000 shares of Richard Packing Company stock. There is no charge in this case that the defendants defrauded the Value Line Fund or that the purchase of this stock by the Value Line Fund was in any way a part of the manipulation. This evidence was admitted solely for the purpose of showing the background within which the alleged conspiracy occurred and should not be considered by you in determining the guilt or innocence of these defendants.

Now, considering the evidence which you have heard, have in mind that the law recognizes two types of evidence. I touched on this briefly before and I will spend a moment or two on it again.

One is direct evidence. Direct evidence is where a witness testifies to facts of his own knowledge

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or things that he saw. Anything that a witness testifies about which comes to him by virtue of his own senses, his own observations, is direct evidence.

The other type of evidence is circumstantial evidence. Circumstantial evidence consists of circumstances from which you may infer by a process of reasoning that certain facts which are sought to be established are true. Of course, the classic example of circumstantial evidence is when someone comes into a room carrying a wet umbrella or wearing a wet raincoat. From what you observe, even though you can't look outside, you conclude that it is raining. As I say, you don't look outside because you can tell from having seen what you have just seen that it is raining outside.

Both direct and circumstantial evidence are good evidence and no greater degree of certainty is required when circumstantial evidence is admitted than when direct evidence is admitted. As a general rule, the law makes no distinction between direct and circumstantial evidence; it simply requires that before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

The Government asks you to draw one set of

inferences, while the defendants ask you to draw another. It is for you alone to decide what inferences you will draw from the evidence and what facts you find to have been proved.

An inference is a deduction or conclusion which reason and common sense leads the jury to draw from the facts which have been proven, but in this connection you must remember that if two sets of inferences may be reasonably drawn from the evidence, one consistent with innocence and the other with guilt, then you must not convict because, as I have explained, the Government must prove each and every element beyond a reasonable doubt.

Now, certain testimony in this case was received with respect to particular defendants only. You will recall many instances where the evidence was admitted only with respect to one defendant or with respect to another defendant or with respect to several defendants. You were informed that it was offered only with respect to such-and-such a defendant or defendants and not against some other one of the defendants. You are instructed to consider such testimony only with respect to the defendant as to whom it was received and not against any other defendant.

You have listened very attentively to the

testimony of the thirty-three -- I believe that is a correct count -- witnesses who testified. Yesterday you heard counsel for each of the parties summarize for you in their closing statements the testimony or lack of testimony upon which they relied to support their contentions.

Included in these contentions is the attack on the credibility of various witnesses. I see no reason to further detail the contentions of the parties or the specific proof to sustain or refute these contentions. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor, as well as his background.

In evaluating the testimony of any witness, you may take into consideration any bias or prejudice of the witness. Bias covers all varieties of hostility or prejudice against another personally.

Consider the witness' ability to observe the matters as to which he or she has testified and whether he or she impresses you as having an accurate recollection

of these matters.

Now, a witness may be discredited or impeached by contradictory evidence or by evidence that at other times he made statements which were inconsistent with his present testimony. Evidence that a witness has been convicted in the past of certain crimes may be considered by you in determining that witness' credibility. This is not to say that a person with prior convictions is to be deemed incapable of telling the truth. Prior convictions, however, may be considered when you determine his believability.

If you believe any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness the credibility, if any, you think it deserves. If you think a witness has testified falsely to you, you may reject all his testimony, or you may accept part of it, if you find it reliable, and reject the rest.

Consider, also, any relation each witness may have to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Finally, consider whether a witness has an interest

Where a witness has an interest, he may have a temptation to color his testimony or even to withhold facts. This doesn't mean that a witness will color his testimony and falsify it because he has an interest; it is merely a factor to be considered by you. Of course, the greater the person's interest, the stronger the temptation may be to color testimony or even to falsify. It is for you to say whether a witness at this trial is truthful, in whole or in part, in the light of his or her demeanor and all the evidence in the case.

If you believe a witness has knowingly testified falsely concerning any material matter, either at this trial or on a previous occasion while testifying under oath, such as before a grand jury or a hearing held by the Securities and Exchange Commission, you have the right, after considering all the testimony of such a witness, to accept or reject such testimony in whole or in part.

In other words, you may decide to accept all or part of such testimony or you may decide to reject the testimony of such a witness. A defendant in a criminal case is under no obligation to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn because a defendant, did not testify. As stated before, a defendant in a criminal case has no burden or duty of calling any witnesses or producing any evidence. There is testimony in this case of the previous good character of the defendant Cohen. You should consider evidence of good character together with all the other facts and all the other evidence in determining the guilt or innocence of the defendant.

Evidence of good character may in itself create a reasonable doubt, where without such evidence, no reasonable doubt would exist. But if from all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that the defendant previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit a defendant merely because you believe that he had been a person of good repute.

You have heard, of course, the testimony of Mr. Shwidock, Mr. Mazzeo, Mr. Rothman, Mr. Deane, and Mr. Hurley.

In the prosecution of crime, the government is frequently called upon to use witnesses who are accomplices to crimes. Often, the government has no choice; it must rely upon witnesses to transactions such as they are. Otherwise, in many instances it would be difficult, if not impossible, to defect and prosecute alleged wrongdoers. This is frequently true in a conspiracy. Conspirators do not publicly proclaim their intentions or operate openly. Conspirators necessarily are often secretive and devious in their activities, and clandestine. Accomplice testimony, however, and I charge you that the Messrs. Shvidock, Mazzeo, Rothman, Boone and Hurley who are named as co-conspirators in the indictment should be considered accomplices, accomplice testimony, however, should be closely examined and weighed with great care; checked with the facts which you find to exist, and checked against the evidence which may corroborate it; and then such testimony should be given such value and weight as you deem proper in all the circumstances.

If you regard the testimony of accomplices as substantially truthful, such testimony should be given appropriate consideration together with all the evidence in the case in determining the guilt or innocence of the defendant. Accomplice testimony by itself is sufficient to convict, if it convinces you of a defendant's guilt beyond a reasonable

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doubt.

It is the rule in the federal courts that a defendant may be convicted even on the uncorroborated testimony of an accomplice. The counts of the information charge that the acts occurred on or about certain dates.

I think I have noted this but I want to make certain that you understand it. It does not matter if a specific transaction is alleged to have occurred on or about a certain date, and the testimony indicates that in fact if you find that it did occur, it was on another date. The law only requires a substantial similarity between the dates alleged in the information and the date finally established by the testimony. It is not necessary for the government to show that any or all of the defendants personally purchased or sold the Richard Packing stock which caused the mailing of the confirmations set forth in the information.

Indeed, the government's position is that it was the three Denver mutual funds who actually bought the stock through Jaffee -- if I said at any point from Jaffee, purchases were through Jaffee & Company from various New York brokerage houses.

Any person that commits the acts that the statute declares to be a crime, of course, commits a crime. It is also a crime not only to commit the illegal acts to which I

have just referred, but to aid or abet or procure or induce another person to commit such an act. That is based on the aiding and abetting statute, which is Title 18, United States Code, Section 2, which I mentioned when I was reading the information. This statute reads as follows:

"A) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

"B) Whoever willfuly causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

That is Title 18, United States Code, Section 2.

The government does not contend and is not required to prove that each and every defendant personally employed a device, scheme or artifice to defraud. Therefore, it is not necessary for a conviction of a defendant on any of these counts that you find that he ever did actually commit any act necessary to commit the offense. Anyone who aided or abetted or procured or induced another person to commit an illegal act is himself guilty of committing that illegal act. While there is no precise rule as to what acts constitute aiding and abetting, it is enough that a defendant in some way associate himself with the criminal

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venture, that he participate in it as in something he wishes to bring about, or, in other words, that he seeks by his action to make it succeed. Government's Exhibit 43 in evidence reflects sales by Mr. Cohen of shares of his personal holdings of Richard Packing Company stock. Mr. Cohen had the right under the law to sell a certain percentage of his holdings from time to time, and this exhibit indicates that he did so.

It is the government's contention, however, that Mr. Cohen under Count 1 was a party to the alleged conspiracy to manipulate the price of Richard Packing Company stock and under Counts 2, 3 and 4, the substantive counts, aided and abetted his co-defendants in achieving the same objectives.

The government contends that as a result of his participation in the conspiracy and his aiding and abetting he was enabled to sell his shares at substantial profits. It is for you to weigh this evidence and to decide whether or not it tends to support the government's claims. If you conclude that Mr. Cohen's motivations in disposing of his stock were innocent, then you have a perfect right to disregard this evidence. There is another alternative basis upon which you may find the three defendants who are named in the substantive counts guilty on each of the counts in which they are named, even if you are not satisfied that as to a

particular defendant each of the elements I have previously described has been proved beyond a reasonable doubt. This alternative basis is as follows:

If you find beyond a reasonable doubt that the substantive offenses alleged in these counts were committed by one or more of the members of the conspiracy referred to in Count 1, that one of the defendants was then a member of that conspiracy and that the acts which constituted those offenses were done in furtherance of a portion of that conspiracy of which that defendant was a member, and that defendant might reasonably have foreseen that those acts would be done, then you may find that the defendant is guilty of the offenses alleged in the substantive counts in which he is named, even though he did not otherwise personally participate in the acts constituting those offenses or did not have knowledge of them.

During this trial you have heard the testimony of certain expert witnesses. Such evidence is admissible where the subject matter involved requires special study, training or skill not within the realm of the ordinary experience of mankind, and the witness is qualified to give an expert opinion.

However, the fact that an expert opinion is given does not mean that it is binding upon the jury or that the jury is obligated to accept the expert's opinion as to what the

facts are. It is the province of the jury to determine the credibility and weight that should be given to the expert opinion in the light of all the evidence.

Although the jury may not arbitrarily disregard the testimony of expert witnesses, if the jury finds that his opinion is not based on the facts or is contrary to the evidence, the jury should disregard it. If it is particularly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness creates the presumption that his testimony would be unfavorable to such party. However, no such presumption should be drawn by the jury where the witness is equally available to all parties or both parties, or where the witness' testimony would be merely cumulative.

During the trial there were admitted in evidence certain exhibits which we have referred to as charts, schedules, or summaries. These exhibits are not themselves independent proof. They purport to be only pictorial or visual representations or resumes of information or data as set forth in the testimony of a witness or in documents that are exhibits in evidence.

You will recall that the charts according to the testimony of Mr. Fujiwara, a government witness, reflect the

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exhibit which were admitted into evidence in the course of the trial or evidence otherwise admitted by stipulation. I the infromation contained in the exhibits or in the testimony is then converted into a visual form or pictorial form and the chart or the summary is marked as an exhibit, the chart or the summary does not have an independent value as proof because it is only based upon the testimony or the exhibits which I have just explained has been stipulated. It is visual aid just to help you understand what is in the exhibits and what is in the testimony, as therefore you will understand that charts and schedules and summaries are not by themselves independent evidence. That's what that means.

The evidence is the testimony. The evidence is the exhibits. And the charts and schedules are no better than the exhibits or the testimony on which they are based. With this in mind, you are entitled to consider the charts, schedules and summaries received in evidence if you find that they are of assistance to you in analyzing the evidence and in understanding the evidence. I am not sending the exhibits which have been received in evidence or the information with you as you retire for your deliberations.

You are entitled, however, to see any or all of the exhibits as you consider your verdict. I suggest that you begin your deliberations and then if it would be helpful to

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you, you may ask for any or all of the exhibits or the information simply by sending a note to me through one of the Marshals.

I would ask counsel if they would stipulate that if a note were sent out requesting specific exhibits which are in evidence, those exhibits which are in evidence may thereupon be sent into the jury. It may be at times counsel will not be here, and Miss Krueger will be here, and if she checks that the exhibits are in evidence, are counsel agreeable that if the jury seeks them we can send them in, or would you prefer not to enter into such an agreement at this time?

MR. ROBSON: I would prefer not, your Honor, because there is frequently a great deal of discrepancy as to what is wanted. I'd like to see the note myself to make sure.

THE COURT: Very well. What we will do on that is, we will await the jurors request and we will review them as they come out. That's satisfactory to the Court. I said before and I will say again, that if during your deliberations you need to hear any of the testimony, you will send out a note and I will bring you back into the courtroom and havethe portion of the testimony which you request read back to you. If you find that anything I have said in these

rather lengthy instructions requires repetition or clarification, again, send a note and an attempt will be made to giv eyou what you need.

I would close with a few general remarks. The punishment provided by law for for the offenses charged in the information is a matter exclusively within the province of the Court, and should never be considered by you in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

Your function now is to weigh the evidence and to determine the guilt or innocence of each defendant with respect to each count in which he is named. For the convenience of the jury I have prepared a two-page verdict form which I have reviewed with counsel, which states, after the caption of the case:

"We the jury report the following verdict," and then it says "Count 1," to the left, and under that the three name of the defendants; to the right, "Verdict," and there are blank lines. On those lines when you have reached a verdict, if, as and when you do reach a verdict, you should write the word "Guilty" or "Not guilty" as to a particular count to the right of the name of the particular defendant.

You will find that there are four counts listed on the two pages, and places for a verdict on each defendant on

each count, and at the bottom a place for the signature of the forelady. Your function is to weigh the evidence in this case and to determine the guilt or innocence of each defendant with respect to each count in which he is named. You must base your verdict solely on the basis of the evidence and these instructions as to the law. The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto.

Your verdict, as you go down the line, and consider each count and each defendant separately, your verdict on that count and that defendant must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agrement if you can do so without violence to individual judgment.

Each of you must decide the case for himself or herself. But do so only after an impartial consideration of the evidence in this case with your fellow jurors. In the course of your deliberation do not hesitate to reexamine your own views and change your opinion if you are convinced that it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember, at all times, you are not partisans. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case. If you are divided, do not report how the vote stands, and if you have reached a verdict, do not report the verdict until you return to open court and your forelady is called upon to report the verdict of the jury.

In conclusion, ladies and gentlemen, I am sure that if you listen to the views of your fellow jurors and if you apply your own common sense, you will reach a fair and just verdict here. Remember that your verdict must be rendered without fear, without favor, and without prejudice or sympathy.

Now, ladies and gentlemen, I am about to have you retire to commence your deliberations in the company of the United States Marshal. I shall have delivered to your forelady a copy of the proposed form of verdict which I have described which may be of some assistance in your deliberations. However, before you retire, I will see counsel, and I would suggest that since the jury has been sitting for some time, I excuse the jury and ask you to proceed to the jury room for a few moments, but I ask you at this juncture not to begin your discussion of the case. I will see counsel and then I will ask the jury to return. I suggest it might

be in order for the four alternate jurors, if they have anything in the jury room, that they bring whatever they have with them back out when they return, and I would ask the twelve regular jurors if they feel at the present moment that they are in good health and are able to deliberate today, tomorrow if necessary, because if you have problems, you might when you come back, indicate it to me.

I want this jury to deliberate fully and fairly. I want people who will deliberate just as you have listened, and if any of the first twelve jurors have any reasons of health or personal reasons which would preclude them from deliberating today and tomorrow if it is necessary -- longer if it is required, I ask you to advise me when you return.

The jury is excused. I ask you not to discuss the case among yourselves at this time and I will recall the jury in a few moments.

(Jury left the courtroom.)

(Recess taken.)

THE COURT: Gentlemen, I havejust distributed to you, now that the jury has left the courtroom, you each now have a Xerox copy of the verdict form which I plan to have our clerk hand to the forelady of the jury. Does anyone have any objection to the form as you see it?

MR. FEFFER: No, your Honor.

MR. BLOCK: No, sir.

MR. SEGAL: No objection.

MR. ROBSON: No, your Honor.

THE COURT: Gentlemen, we will now proceed with thematter of exceptions to the charge which I will take first, and after that, I will hear any requests for supplementary instructions.

Mr. Block, you may proceed.

MR. BLOCK: Thank you. Your Honor, before I talk about exceptions, I'd like the record to show that I handed to your Honor this morning, off the record, Cohen's supplemental requests numbers 6 though 11, and ~~irrespective~~ I except to your Honor's refusal to charge as requested.

THE COURT: Now, do you, though, withdraw Cohen's supplemental request number 7?

MR. BLOCK: I do.

THE COURT: You have your exception to the Court's refusal to charge Cohen's supplemental requests 6, and 8 through 11.

MR. BLOCK: Now if your Honor please, I except to your Honor's charge that no reliance is necessary. I object to your Honor's charge which incorporated the government's requests number 31, in part. I except to your Honor's charge with respect to the fact that witnesses are available, that

no inference can be drawn by witnesses who are availalbe to both sides and if I could just say briefly that it seems to me to be wholly inconsistent with your Honor's completely appropriate charge that the defense is not required to produce any witnesses.

THE COURT: I just want to comment on that. The charge appeared to the Court to be appropriate in view of the fact that the defense chose to present witnesses. I myself considered the matter differently had the defense chosen to rest at the end of the government's case. I felt that the defense having presented witnesses, I felt that the charge, which is a relatively standard charge, I thought that charge was appropriate and of course for that reason delivered it. You may proceed.

MR. BLOCK: The only other thing I have is that your Honor had, and I hope I'm not stealing Mr. Segal's thunder, but your Honor had granted Mr. Segal's request number 8 which dealt with reasonable doubt and concluded a sentence reading as follows:

"A defendant is never to be convicted on mere suspicion or conjecture." I respectfully except to your Honor's failure to include that particular sentence in his charge. That concludes my exceptions.

THE COURT: Thank you, Mr. Block. Mr. Segal, do

you have any exceptions?

MR. SEGAL: I have, your Honor. First, with regard to the Court's charge on Count 1, the Court at one point in its charge chose to delineate the false statements, the oral statements and press releases with regard to the number of franchises sold as the government's contention of what the flase statements were, that they were false and misleading and omitted material facts.

The Court went on to say that particularly the government referred to the press release of April 6, 1970, which is Exhibit 31G, with Richard Packing selling 200 franchises by that date, and the government's stating that it was misleading and that they omitted and cancelled franchises and misleading because they did not state that the franchise operation was losing money.

The Court then stated that the defendant on other hand believed these statements to be true, he[illegible] on to say, went on to speak about projections [illegible]ions that had been made by the defendants and indica[illegible]hat projections were mere estimates and in any event the[illegible] were made in good faith. My impression, and again, I was just trying to copy quickly as the Court was reading, was thatthe Court was comparing things that were not in fact comparable.

It had raised a contention of the government and

and then countered with a contention of defendants which is not appropriate to meet the contention of the government.

In effect it did not state whether the government proved that the individuals here, these defendants, particularly Deutsch and Duboff, were picked out of this, does not state whether the government proved they knew that any of the statements were false or they had been shown that any of the statements were false, but merely puts our contention on a basis of whether or not they believed it to be true. And I felt that did not quite cover and in fact may have not been full enough in order to show that this is something that has to be shown of the defendant, and that if falsity is alleged, then the government would be under an obligation to show that they had contrary evidence as of that time and despite that went ahead and made this kind of a statement.

So that I believe that while I don't carp with what the Court said about they believed to be true, I just don't believe that this presents the contention in the way it should be presented.

THE COURT: You may disagree, but I adapted it from Mr. Cohen's supplemental request number 2. I took it from there and had indicated, of course, previously that I intended to adapt from that. I think I said I was going to charge Mr. Cohen's supplemental request 2 either in whole or

in substance, when I ruled. If you look at it, that certainly in general comports with what I said in my charge to the jury where he talks about mere estimates and not finding criminal intent in the furnihsing of estimates, even if the statements later prove wrong in connection with the conspiracy count.

You have excepted and I will note of course, your exception for the record. Do you have any other --

MR. ROBSON: Your Honor, Could I comment on this one, because I have the same comment. I think your Honor is misunderstanding what Mr. Segal is trying to say.

THE COURT: Why don't we wait until he finishes, and then you can make your exception.

MR. SEGAL: The second point that I would raise is with regard to your Honor's charge on intent; particularly that element in which you indicated that intent is more clearly and conclusively shown by the act itself.

I don't mean to absolutely quote the Court. These are my notes on what I believe the Court said. But one thing that is clear about what the Court said, actions speak louder than words, that was a statement the Court had made. The Court went on to state that this related to acts done or acts omitted to be done.

My comment on this, and I would ask the Court to

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correct, would be that the Court must also indicate as to whether acts done or acts omitted to be done overlooks the fact as to whether there is any obligation to do any act. Whether in fact there is any obligation or was any obligation to send out a release or do something affirmative in the role particularly of Mr. Deutsch and Mr. Duboff.

I also felt that by using a definition of intent, the words "actions speak louder than words" in effect allows the jury to reach the conclusion that if you did it, you had a criminal intent. And the action itself is enough and suffices.

And I would ask the Court to reconsider whether or not actions speak louder than words are an accurate gauge upon which a jury may reach a conclusion as to whether or not an individual had intent.

THE COURT: Of course there I am speaking about circumstantial evidence regarding intent. I think you may have taken the matter only in part. I have your exception and I decline to change the charge as given in this regard.

Would you set forth your next exception, please?

MR. SEGAL: Yes, your Honor. The next relates to the use of the words "normal profit" in connection with the New Dimension execution of orders at Jaffee. The words "normal profit" is used and this jury has, I feel, no guide

as to what constitutes a normal profit, and particularly in light of the fact that the government has argued in it s summation that a point or an eighth of a point was what was obtained by Naddeo and others who were executing for the Jaffee orders, while New Dimension Securities the government went to pains to show were executing with 2 and 3 and 4 dollar profits in there.

Under different circumstances, different stocks at different times could have $4 as a norm or four points as a norm or an eighth of a point as a norm, and in fact we had testimony as to that here, that wen bought in quantity and when a trader is assured thathe has an order in hand, he is willing to work against less of a profit because he is running almost no risk or he is running no risk.

THE COURT: I think that there is enough in the record through the testimony of people like Mr. Mazzeo and Mr. Mayer, those two names come to mind, to indicate a practice for the jury to determine what is meant by normal. If the record were devoid of any evidence as to practice, I could see a point here, and I think, frankly, since practice is a variable thing, it could not be defined any better than that.

I will deny your request that I in some way change that portion of my charge. I have noted, and you have noted of course your exception. Do you have anything else?

MR. SEGAL: Yes, your Honor. The next item is the Court spoke about the definition, about convicting a defendant, three elements were necessary. The scheme to defraud, the wilful and knowing and causing the use of the mails. This is with regard to Count 2 now.

In talking about the scheme, I believe the Court stated that this was a scheme or any plan by representation ofmaterial facts which are false or by omitting to state facts that were truthful.

My comment there is that the Court should have indicated that the defendants must know that the material which is stated or omitted is in fact -- has in fact occurred. So that if a defendant makes a statement and that statement happens to omit a fact or a factor that has occured in the business, unless that defendant was in a position to know that that did in fact occur, that omission could not be objectionable under the circumstances.

If the government has not shown that he knew nad despite knowing omitted it, even he cannot be held chargable under that third element in Count 2.

THE COURT: I think you have really taken a portion of the charge, because I recall having stated to the jury the three elements under counts-- either Count 2 or Count 3. One or first that the defendant in connection with

the sale of Richard Packing Company stock engaged in a scheme to defraud or to obtain money and property by means of untrue statements of material facts or by means of omissions to state material facts necessary in order to make his statements not misleading, then second, that the defendant did so wilfuly and knowingly and of course third, was the use of the mails.

And then I went on to describe the matter further. I do believe that I have covered that. You have made your objection. You have your exception. I decline to change my charge in that respect. Anything else?

MR. SEGAL: Yes, your Honor. Your Honor went on to speak about what is material and I believe the definition was facts which can reasonably cause a person to act or not act, words to that effect.

THE COURT: Material facts include those facts which affect the possible future of the company and those which may affect the desire of investors to buy, sell or hold the customer's securities. That followed the item which you just mentioned.

MR. SEGAL: That's correct, your Honor.

THE COURT: I think that if you take the matter in context, the two separate thoughts that I gave, first what you said and then what followed, I think it creates a fair picture of the definition of material.

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MR. SEGAL: Your Honor, I state that as a preface to what I am driving at on this particular point now. That is, having stated what is material, that is, facts which can cause a person to act or not to act, the Court then went on to say, after talking about facts that affect the possible future or cuase a person to -- I have to hold or to buy the stock, I believe the Court made some attempt in that sense, but the point that I am after is that the Court went on to say that it was not necessary that the false statements were relied upon. It was only necessary that they are made.

My point here is that if a material fact is one upon which a person either acts or does not act, and then this jury is told that it's not necessary that they are relied upon, what then is material about the statement? Because if it is material, then they have to act on it. If they needn't have relied upon it, it was necessary that the statement be made, then it is not a material statement.

I find that there may be some confusion or that this section needs some clarification. If we are talking about material statements at the same time that we are talking about the fact that they are not necessary to be relied upon, it is only necessary that they are to be made, then I would indicate too that that theory almost puts an absolute liability on statements, and at that point it become:

something less than due process. If that is the scale to which defendants are held.

THE COURT: You start out I think with a very clear line of cases that one does not have to show reliance, where you have false statements, that is, statements where material facts have been omitted. I think that the manner in which I charged the jury on that, which is "It is not necessary for the government to establish that anyone relied on or suffered damage as a consequence of any false statement or omissions of material facts, it is enough that false statements or statements omitting material facts would be made in the expectation that they would be relied upon;" I think that statement fairly states the law. You have your exception.

MR. SEGAL: Your Honor, the next item deals with the Court's addressing itself to manipulation with regard to the Denver funds, indicating the government's position was the manipulation was not disclosed to the purchasers, and that such sales are part of the fraudulent scheme, regardless of what happened to the price.

These are just my notes. My comment there is that I believe eith the description of the government's position about manipulation is misapplied here because it ignores evidence about the fund controlling the float, and

if there is any basis for a manipulation, that at least should be brought to the attention of the jury, by the funds controlling 75 percent of the float, if there was manipulation, it is possible that the funds were manipulating, if somebody else was manipulating.

THE COURT: Each of you, if I recall correctly, suggested and agreed that the Court not marshal the evidence. And really, what you're asking for at this point after the fact is that I do marshal the evidence because I think that would be something that would be includable in a marshaling. You have your exception.

MR. SEGAL: Very well, your Honor. The next item dealt with the Court's charge on Cohen's reliance on advice of counsel. And, that if there was such a reliance, perhaps he can be exonnerated on that basis. I would suguest to the Court that the Court has failed to state that if he is exonnerated on the basis of attorney's advice, that Deutsch and Duboff must be exonnerated, and that there is no statement about Deutsch and Duboff, about the lack of proof with regard to Deutsch and Duboff participating in that offering circular. And if --

THE COURT: I indicated to you before I charged that I was going to charge the request made by Mr. Block. I don't recall that I have any similar requests from either

of you or a request that you be included within that charge.

Under the circumstances, and based on the proof overall, I am disposed to deny your request that in some way I supplementally charge now.

Anything else, Mr. Segal?

MR. SEGAL: Yes, your Honor, the next item is that the jury must be told, they must make a determination with regard to the testimony relating to the cash and checks from Kelly, Andrews &Bradley. As I recall it, the way it was stated would indicate that that is a fact in the record. And there was no caveat about the jury making a determination whether or not that testimony is to be believed and if it in fact occurred, and if they can consider that as in the case, since it emanates from Shwidock. So that the way it was presented, it was presented as something which is there in connection with motive, as if it is an irrefutable item, even though it is only there for motive.

But I think that the first determination that this jury must consider is whether or not those checks and that testimony can be believed, and if it is not believed, then they can only consider it as to motive.

THE COURT: You seem to forget that I received request number 6 from Mr. Duboff, and reviewed that request with counsel. And that covers the point that you're making.

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and no one, my having read this request to you, made that request before I delivered it to the jury. And under the circumstances, it seems to come poorly now; you having or at least your co-defendant's counsel having presented this Court and the Court having gone over with all of you to say that it should be changed now.

The time for that, if at all, would have been earlier. I think the portion of the charge was given in this regard is fair, and I decline to amend or supplement it now.

Anything else, Mr. Segal?

MR. SEGAL: Yes, your Honor. I object that the Court, and I can shortcut this, has adopted request number 36 of the government in terms of the accomplice charge. If that is so, then I can merely object to that specifically as an indication here of what I feel is an unfair statement particularly in light of its being used in the following context.

You must realize, I'm sure, that in the prosecution of a crime the government is frequently called upon to use witnesses who are accomplices --

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THE COURT: To crimes?

MR. SEGAL: I am merely reading from 36, your Honor --

THE COURT: May I suggest that I adapted the accomplice charge from the charge of Judge Bauman in USA v. Soldono, and you will find it at Page 2500 and 2501 of that record.

MR. SEGAL: Your Honor, I am not sure whether in the Court's charge you stated as is stated in Government's Request No. 6, "Frequently it happens that only members of the conspiracy have evidence that is relevant to and is important in a case" --

THE COURT: No, I don't believe that I did, unless I just departed from the text -- I did not adopt the Government's request in haec verba, but I did follow very closely the charge of Judge Bauman in Soldono, and I have indicated the pages.

MR. SEGAL: I would object to the accomplice description and particularly object to the naming of Mazzeo and Hurly in the light of their specific denial on the stand of having conspired with anybody --

THE COURT: Would you like me to call the jury back now and tell them they should not consider that Mr. Mazzeo and Mr. Hurley were accomplices? Would you like

me to do that? If all counsel for the defendants wish me to do that, I will do it, but all of you must agree on it.

Do you wish that now?

MR. BLOCK: If your Honor please, I have a request --

MR. ROBSON: I have some comments on that, too --

MR. BLOCK: Could your Honor hold that until you take the additional requests, in the light of your charge, because maybe we will want that.

MR. SEGAL: Your Honor, I will go to the next point.

THE COURT: You don't accept my offer?

MR. SEGAL: I would like to talk to other counsel, your Honor.

THE COURT: You will have to do it right now, because I want to bring the jury back.

MR. SEGAL: I understand that, your Honor. May we have a moment, then?

MR. ROBSON: I would not accept that, your Honor, because it doesn't resolve theproblem I see with the charge, and I could not accept that kind of suggestion because it doesn't solve the problem.

THE COURT: You may proceed.

MR. SEGAL: My final objection here, as far as I have been able to point out from listening, is what is in effect the adoption by the Court of Government's Request No. 31, which is labeled "Conspirators' Responsibility for Subsequent Offenses." That came just before the portion with regard to experts, I believe.

THE COURT: You join Mr. Block in that exception?

MR. SEGAL: Yes.

THE COURT: You have your exception.

MR. SEGAL: That is confusing, and undoes what good may have been done in any previous part of the Court's charge.

THE COURT: Thank you, Mr. Segal.

Mr. Robson.

MR. ROBSON: Just to be sure I cover everything, let me join in Mr. Block's and Mr. Segal's exception except as to the one which covered a charge I requested, with respect to the Shwidock payments. I don't object to that one.

I will have to repeat some of what Mr. Segal said:

I except to a statement your Honor made to the effect that the jurors are at liberty to disregard the Court's comments. I think in the context that was stated it indicates they may or may not accept the Court's comments

and I think that should be coupled with a statement that it is their recollection of the evidence -- the statement was made in such a way to indicate the jury could accept the Court's comments, and nothing more.

THE COURT: You have your exception on that. I will not change my charge in that regard.

MR. ROBSON: With respect to the exception Mr. Segal made to the charge your Honor gave concerning the franchises and that explanation, I think your Honor misunderstood what Mr. Segal was saying -- Mr. Segal didn't articulate it as well -- in any event, the problem was not the reference to the estimates of future earnings being an inaccurate statement of the charge, and I think that was what you picked up from Mr. Cohen's requests and that was a satisfactory charge, but not in that context.

The press release was in April 1970. The estimates were in March and July of 1969.

What your Honor did say was that the defendants' contentions with respect to these false statements were merely that they blieved them to be true. That was all your Honor said with respect to the 200 franchise example you used, and then you went on to say that in addition the defendants claim their estimates of earnings were based upon their good faith.

Well, the estimates of earnings had nothing to do -- they were not given at the same time and should not have been placed in juxtaposition.

Moreover, your Honor leaves out many of the defendants' contentions. The defendants' contentions go well beyond the statement they believed them to be, but we stated they were true, we in good faith believed them to be true, and with respect to Mr. Duboff, he did not make the representations and was not aware they were being made and he was not present. Your Honor has left with the jury the concept the only defense we raised on the press releases was that we believed them to be true.

THE COURT: You have your exception, Mr. Robson.

MR. ROBSON: In your Honor's charge with respect to the determination of a defendant's participation in the conspiracy, unless I missed it, your Honor did not charge that in determining whether or not a defendant is a member of a conspiracy only his acts and declarations may be considered up to that point.

THE COURT: I think my charge now states the law as it exists in this Circuit. You have your exception.

MR. ROBSON: Your Honor did not charge the jury, and I can except to that, that statements by co-conspirators may be considered against a particular defendant only after

that defendant is determined to have been a member of the conspiracy.

THE COURT: I think that, again, the law as I have recently read it, as set down in this Circuit, places this determination, in the first instance, within the province of the Court, and under the circumstances -- I believe that the charge as constituted now sets forth the law in this Circuit, and I will not change my charge, and I will grant you your exception.

MR. ROBSON: I have joined, of course, with Mr. Segal and Mr. Block in excepting to the charge which covered Request No. 31.

In addition to that, I would like to go a step beyond that: I think the way that the charge was read leaves the jury to infer not only that the acts of other conspirators may be taken into account if there was a conspiracy, but even if there were no participation by the defendant in the conspiracy. I think that the charge should be clarified so that the jury is told that they may not consider evidence of a co-conspirator's conduct in the conspiracy as to the substantive count if they do not find that defendant was a member of the conspiracy. I don't think that is clear in the charge.

THE COURT: You have your exception.

MR. ROBSON: Your Honor made a statement that the material required to be included in an offering circular is designated by law, and I believe that that is not -- it is not inaccurate, but it is not a completely accurate statement. It is designated by rules adopted by the Security and Exchange Commission pursuant to authority, and those rules are guidelines. I think your Honor's statement that the material required to be included is designated by law gives to this alleged material a formality and authority which it doesn't have.

THE COURT: You have your exception.

I consider, incidentally, the rules to be the law. Now, I don't know if you do.

MR. ROBSON: The rules are, to some extent, the law. I did not say it was inaccurate, but it is not the statute which provides it but, moreover, these rules are guidelines.

THE COURT: You remember I discussed in the first instance registration statements and offering circulars. I think that if you look to the case of USA v. Kimball Securities, you will find that although I moved from the registration statement to the offering circular, the same situation prevails.

In any event, you have your exception.

MR. ROBSON: There was some discussion with respect to the charge on accomplices. My concern with that charge is that that charge was designed to be used in a situation where witnesses testify and concede they are accomplices. Not one of the alleged co-conspirators who testified conceded he was involved as an accomplice or a conspirator.

THE COURT: What about Mr. Shwidock?

MR. ROBSON: He denied he ever conspired or agreed with anybody to manipulate stock.

THE COURT: If you say that, I think I can discount everything else you just said in this argument. If I ever heard an accomplice testifying --

MR. ROBSON: Mr. Shwidock couldn't be an accomplice unless there was a manipulation, and if --

THE COURT: If that is your point, get on to the next one.

MR. ROBSON: The point is, the jury should be told whether or not somebody is an accomplice is for them to decide. You have given the jury your impression that all these four people are accomplices.

THE COURT: If you all want it that way, you shall have it. They should be told it is for --

MR. ROBSON: They should be told it is for them to decide who is a conspirator and who is an accomplice.

THE COURT: You shall have that. I shall charge that "Whether or not a person is a conspirator or an accomplice is for you and you alone to decide."

I will charge that. What else do you have?

MR. ROBSON: Just one more. The one that Mr. Segal mentioned, and your Honor said that nobody requested that, and I call your Honor's attention to part of my Request No. 1, which your Honor denied, in which I stated the testimony established that Mr. Malmon, counsel for Richard Packing Company, was advised Kelly, Andrews & Bradley was involved in the offering but never asked what its role was and forgot to file an amendment referring to Kelly, Andrews & Bradley, and "unless you find beyond a reasonable doubt that Mr. Malmon was lying and that, in fact, the defendants were responsible for wilfully omitting this information, you may not consider this aspect of the case in determining defendants' guilt."

That request was intended to cover what your Honor indicated we did not ask for. It becomes magnified by what I consider to be two errors in your Honor's charge:

One, in that you limited Mr. Malmon's role for the protection only of Mr. Cohen; and

Two, you limited it to a situation only where Mr.

Cohen specifically asked for some advice and gave all of the information and got an answer, and it is our position, and has been our contention, that Mr. Malmon, as the specialist responsible for this thing, was obligated not only to answer questions but to advise his client and anybody else involved, and Mr. Deutsch and Mr. Duboff are not involved, and therefore I except to the entire charge with respect to the role of Mr. Malmon. It is not only inadequate but highly prejudicial to my client.

THE COURT: You were aware I was going to charge what Mr. Block presented and you said nothing beforehand and you come in after the fact with this objection.

You have your exception. Next?

MR. ROBSON: I don't know of any such charge by Mr. Block. If I missed that --

THE COURT: What I charged them on Mr. Malmon was Mr. Block's Request No. 12, and you heard that I was going to charge that, in whole or in substance, and if you look, I did.

MR. ROBSON: I missed that, your Honor, in the pressure of trying to go through the Government's requests which were given the afternoon --

THE COURT: Well, Mr. Block can show it to you.

MR. BLOCK: Your Honor, while Mr. Robson --

THE COURT: No, I want to get Mr. Robson's exceptions to the charge on the record.

Go ahead, Mr. Robson.

MR. ROBSON: I don't have any objection to this. All I am saying is that it doesn't go far enough and your Honor has denied my request, and in the context of this charge I will have to concede that I didn't recognize the possibility, I did not see your Honor's charge in full, and I was going through these things rather rapidly.

The point is, the way you charged on the role of Mr. Malmon, it completely puts us out of the case insofar as it is concerned. We are not even in the company and yet we are not entitled to rely on Mr. Malmon's function at all. It was Mr. Malmon's function to find out what the facts were and tell his client what to find out, and I think the jury is being put in a position where we can be very, very seriously damaged by that charge.

THE COURT: You have your exceptions, and then I will hear supplemental requests.

MR. SEGAL: Your Honor, I would join in what other counsel have said, with the exception of the objection Mr. Robson made to my own.

THE COURT: Each of you joins with the other except where you except to each other.

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MR. FEFFER: Your Honor, I have only a few comments.

One, I would suggest that the information be given directly instead of waiting for a note, that we pass a note in --

THE COURT: Is that agreeable?

MR. SEGAL: No, your Honor.

MR. FEFFER: After the conspiracy charge and after the discussion we had this morning with respect to subject to connection, I believe you came back to it again, and I think you said they could only consider evidence that was admitted against that person. It was an isolated spot after you went through the conspiracy, and I think that is contradicted by the conspiracy charge, the aiding and abetting charge, and by the Pinkerton charge. I think that was meant to come out when --

THE COURT: If you can point out where it is, I can look at it.

MR. FEFFER: You came back to certain evidence in this trial being admitted subject to connection, and then you went on and described it.

THE COURT: Yes, perhaps it is here --

MR. FEFFER: And that is inconsistent with --

THE COURT: Well, the defendants didn't object

to this in any way, and it is favorable to them and, therefore, I am going to leave it, unless they wish it taken out.

MR. FEFFER: Your Honor, my point is that the jury is now with left with an inconsistent charge on how they are to consider the testimony. That is inconsistent with your Honor's charge on the evidence that they can consider on the conspiracy count.

THE COURT: Yes, but you have to go to the context.

I came back to this, if you recall, after I discussed the substantive counts, and in my mind at least, it related to the substantive counts and the problems therein.

It is possible the jury could come in with a not guilty verdict on conspiracy and, therefore, I felt it was quite consistent, but I discussed it -- you say later on in the charge, but I discussed it in the point of the charge which related to the substantive counts.

MR. FEFFER: Fine, your Honor. I just wanted to be sure it was clear.

As to the Value Line information, you said it was received as background. I believe it was admitted as proof of similar acts.

THE COURT: I adopted a defense request submitted by Mr. Robson, and I will let it stand.

MR. FEFFER: Another thing, you said it was the Government's theory that Mr. Cohen was aiding and abetting on Counts 2, 3 and 4. That is not accurate. As to those three counts, Mr. Cohen was an aider and abettor, is what you said --

THE COURT: Let me go back to that.

(Pause.)

THE COURT: Yes, it is Mr. Block's Request No. 13. I am going to let it stand. The defense asked for it and if there is a later request by the jury for some clarification, we can cover it.

But I did indicate I was going to grant that and there was no objection made by you previously, and I am going to let it stand. The defense haven't objected to that. I will let it stand.

MR. FEFFER: I believe when you were describing underwriting you used the terms "directly or indirectly participated in the underwriting."

MR. BLOCK: I think you misspoke, your Honor.

MR. FEFFER: It should be in the distribution, your Honor.

THE COURT: Yes.

MR. FEFFER: That came out very unclear and I think that is very important for the jury to get right.

THE COURT: I have it as "distribution."

MR. FEFFER: But I think you said "underwriting."

THE COURT: Perhaps the reporter can go back to that. It is where I am talking about the definition of an underwriting.

Which language are you thinking of? It would be from your Request 35.

MR. FEFFER: I think you first said, your Honor, something to the effect that people purchase and what they do with the shares, and then you came back and used the terms "directly or indirectly participating" and instead of saying "in the distribution," you said "in the urderwriting."

I think it was incorrect in the request as given to your Honor, too. It doesn't make any sense that way.

THE COURT: Oh, yes, I see it now. I did make that error.

MR. BLOCK: The request itself used the incorrect word.

THE COURT: "Indirectly in the distribution"?

MR. FEFFER: Yes.

THE COURT: Does the defense want me to repeat

that whole definition of underwriting?

MR. SEGAL: No.

MR. ROBSON: No.

THE COURT: If you all waive my repeating that, may I suggest that if the jury asks later for me to define "underwriter," at that point I will restate it using the word "distribution."

MR. FEFFER: Your Honor, I don't think that makes any sense at all. The jury is supposed to go in there with proper instructions on the law, and we all concede there was an error made with respect to one word, and I think the least we can do is note to the jury so they are not in the room deliberating under a false impression.

THE COURT: All right, I will do that. I will merely take that portion beginning with "under the federal securities laws, an underwriter is someone" and through "shares sold in March 1969 Regulation A public offering."

I will do that.

MR. ROBSON: Are you just going to read it in a corrected version?

THE COURT: Yes. I will just say I misspoke myself.

MR. FEFFER: I think your Honor used the term "moral certainty" when talking about reasonable doubt.

THE COURT: Beyond a moral certainty, yes, I did.

MR. FEFFER: I believe that is not the correct law, your Honor.

THE COURT: Very well. It will stand.

MR. FEFFER: And the Government referred in summation to the fact that a hundred thousand dollars was made by Kelly, Andrews & Bradley in the trading of Status Marketing and the Government previously suggested that your Honor explain to the jury how that evidence came into this trial, and if defense counsel doesn't want to do so, that is fine, but the Government did request and requests now some explanation as to the reason for the admissibility of that testimony.

MR. ROBSON: I would just as soon the jury forgot it, your Honor.

THE COURT: I will leave it at that.

MR. FEFFER: There was a stipulation that the offering circular was mailed and was duly received in Chicago.

MR. BLOCK: You mean the notification?

MR. FEFFER: Right.

THE COURT: That was on Count 4?

MR. FEFFER: Yes.

MR. ROBSON: I think that is true.

MR. FEFFER: So that should be told to the jury.

THE COURT: Yes, I will.

MR. FEFFER: Thank you.

THE COURT: "Duly mailed and received by the SEC in Chicago." All right.

Are there any requests for supplemental instructions?

MR. BLOCK: I have one, your Honor.

Your Honor, I would request that your Honor state this to the jury, and this is in the light of the Government's summation: "Your recollection governs as to the evidence with respect to the number of franchises, the number of cancellations, and the financial condition of the company at the time of the press release of April 6, 197," which is 31-G.

I make that request, and I think, in fairness, your Honor, in light of some of the things which the Government said in summation, such as they were being cancelled right and left, when there were only three cancellations testified to, plus the question of the financial condition, and so forth -- all I am saying is leave it to

the jury; that's all.

THE COURT: Do you have any other requests for supplemental instructions?

MR. BLOCK: No, your Honor.

THE COURT: Do you wish to comment on that, Mr. Feffer?

MR. FEFFER: Your Honor told them during the trial and during the charge, that it is their recollection that governs, and highlighting this area now I think is unfair.

THE COURT: The request is denied.

MR. SEGAL: I have no further requests, your Honor.

THE COURT: Mr. Robson?

MR. ROBSON: No further requests.

THE COURT: Very well.

Bring in the jury and I will make three supplemental comments.

About the accomplice, I will explain the definition, and the definition of underwriter, and I will indicate that the parties stipulated that the offering circular, Government's Exhibit 5-B, was duly mailed and received by the SEC in Chicago.

(Jury present.)

THE COURT: Ladies and gentlemen, while you were out I heard a number of legal matters which were presented to me by counsel. As a result of that, I wish to cover three points with you which will correct and supplement portions of my charge.

Point No. 1: You know I mentioned to you that there were certain persons who were alleged to be co-conspirators and I also indicated and named some people whom I indicated were accomplices. I charge you that whether or not a person is a co-conspirator or an accomplice is for you and you alone to decide.

In one portion of my charge, I misspoke myself as to a word, and therefore I am going to read the entire paragraph over to you where I misspoke myself. Where I was giving you the definition of an underwriter, I made an error of a word and now I am going to read the material as it should have been read to you in the first instance:

"Under the federal securities laws, an underwriter is one who purchased Richard Packing common stock from Richard Packing Company in the 10,000 share Regulation A public offering in March 1969 with a view to distributing that stock, or who sold Richard Packing stock as part of the Regulation A distribution in March 1969, or someone

who participated directly or indirectly in the distribution of the 10,000 shares sold in the March 1969 Regulation A public offering."

Finally, I charge you that during the course of the trial, counsel stipulated that Government's Exhibit 5, that SEC file, was duly mailed, filed and received by the Securities and Exchange Commission in Chicago, Illinois. That was a stipulation and shall be accepted by you for the purpose of your deliberations.

Before I sent you to lunch, and it is my intention to send all of you to lunch together for the last time, with the marshal, and as the guests of the Government and yourselves as taxpayers, I would like to see counsel at the side bar.

(Discussion off the record at the bench.)

(In open court.)

THE COURT: Miss Kruger, would you place the deputy marshal under oath to attend the jury.

(A marshal was duly sworn.)

THE COURT: Marshal, you are going to be taking the sixteen jurors to lunch.

Could you tell us, without rushing the jury, what time you anticipate returning?

THE MARSHAL: About 2:30, your Honor.

going to furnish to you, we stand ready to assist you, and to each and every one of you, on behalf of all of us, I want to excuse and thank the four alternate jurors in this case.

You are excused with the thanks of the Court.

(Recess.)

(2:55 p.m.; in open court, jury not present.)

THE COURT: Gentlemen, I have received a note from the jury. This is the first note:

"Your Honor: The jury respectfully requests a copy of the information. Thank you, Miss Short."

Miss Kruger, would you mark this note as Court's Exhibit 6.

(Note marked Court's Exhibit No. 6.)

THE COURT: Gentlemen, if you would review a corrected copy of the information and after you have done so if you would hand it to me, I will have the corrected copy of the information delivered to the jury.

Is that satisfactory?

MR. SCHATTEN: Yes, sir.

MR. BLOCK: Yes, sir.

MR. ORENSTEIN: Yes, sir.

MR. SEGAL: Yes, sir.

MR. ROBSON: Yes, sir.

MR. SEGAL: Your Honor, we have reviewed the copy of the information that is to be handed to the jury for their deliberations and we find that it comports with the copy of the information which the Court has redacted.

It is satisfactory in its present form.

THE COURT: It is satisfactory to all counsel?

MR. BLOCK: Yes.

MR. ORENSTEIN: Yes.

MR. ROBSON: Yes.

THE COURT: Miss Kruger, would you hand that to the marshal and see to it that the jury receives the copy of the information?

THE CLERK: Yes, your Honor.

THE COURT: Thank you, gentlemen.

(Recess.)

(3:15 p.m.; in open court, jury not present.)

THE COURT: Gentlemen, I have received a second note from the jury which reads as follows:

"Your Honor: The jury respectfully requests the following documents: The March 1969 offering circular; the 1969 annual report; the press releases. Thank you, Miss Short."

I am marking this second note from the jury as Court's Exhibit 7, and I would suggest that what the

jury is requesting are Government's Exhibits 5-B, 13-A and those portions of the 31 series which are in evidence.

Is that your understanding, gentlemen?

MR. FEFFER: Yes, your Honor.

Here is 5-B. Here is 31-A, -B, -C, -D, -E -- -F is not in -- and -G.

THE COURT: Gentlemen, Mr. Feffer has handed me Government's Exhibit 5-B in evidence, 13-A in evidence, 31-A, -B, -C, -D, -E and -G in evidence. These appears to be the exhibits requested by the jury.

Is it agreeable to all counsel that I send these exhibits in to the jury in response to the note which has been marked Court's Exhibit 7?

MR. BLOCK: Yes, your Honor.

MR. ORENSTEIN: Yes, your Honor.

MR. SEGAL: Yes.

MR. ROBSON: Yes.

THE CLERK: Court's Exhibit 7 is marked for identification.

(Note marked Court's Exhibit No. 7.)

THE COURT: Thank you, gentlemen.

(Recess.)

xxx

(4:25 p.m.; in open court; jury not present.)

THE COURT: All counsel consent to the jury separating for the evening, and I will give them their instructions.

(The jury entered the courtroom.)

THE COURT: Ladies and gentlemen, unless the jury unanimously wishes to stay late this evening, I had indicated to you all that counsel were agreeable to your going home tonight and I had indicated that I was prepared to send you home at 4:30 p.m.

Is it agreeable to the jury that we recess at this hour, Madam Forelady?

THE FORELADY: Yes.

THE COURT: Very well, ladies and gentlemen, I am going to excuse the jury and direct that you return to resume your deliberations tomorrow morning at 9:30 a.m.

Is that a satisfactory beginning hour for all of you?

THE FORELADY: Yes.

THE COURT: Very well.

When you come in tomorrow morning, you will go right to your jury room and the marshal will attend you. Please do not start to discuss the case until all twelve of you are in the room.

I will be here beginning at 9:30 and counsel will be available as well should you have any further inquiries in the form of requests of any kind, nature or description.

As you separate and go home tonight, it becomes more important than ever that I direct you not to discuss this case with anyone, either here at the courthouse, on your way home, or wherever you are this evening, and not to discuss the case again until you reassemble and all twelve of you are together tomorrow morning.

In addition, I direct that you not read any newspaper article, listen to any radio broadcast, nor view any television program which might discuss the case. In the unlikely event that this occurs, I direct that you report the matter to me at once.

You are to resume your deliberations on this case when all of you have reassembled tomorrow morning.

The jury is released and directed to return to resume deliberations at 9:30 a.m. tomorrow morning.

Good night and get home safely.

(The jury leaves the courtroom.)

THE COURT: Gentlemen, I will ask that you return and the defendants return tomorrow morning at 9:30 a.m.

MR. ROBSON: If your Honor please, I have a

court appearance scheduled for 10:00 o'clock tomorrow morning in the Supreme Court in Kings County, and with the Court's permission, someone from my office will be here until I arrive, which will be at about 10:30.

This is with the consent of Mr. Duboff, and also Mr. Segal is authorized to act for me or Mr.Duboff in my absence.

THE COURT: Mr. Duboff, do you consent that Mr. Segal and Mr. Robson's associate act on your behalf in the event there are any notes or requests from the jury which are received when Mr. Robson is not present?

DEFENDANT DUBOFF: Yes, your Honor.

THE COURT: Mr. Segal, are you prepared to undertake to represent Mr. Duboff along with Mr. Robson's associate in the event there are any notes from the jury, which come in while Mr. Robson is absence? Is that correct?

MR. SEGAL: Yes, I will, your Honor?

THE COURT: Anything further, gentlemen?

Good night. I will see you tomorrow morning at 9:30.

(Adjournment taken to June 7, 1974 at 9:30 a.m.)

UNITED STATES OF AMERICA

v. 74 Cr. 447

MILTON COHEN, et al.

June 7, 1974
9:30 a.m.

(The jury reassembled to continue their deliberations.)

(10:50 a.m. In open court; jury not present.)

THE COURT: Gentlemen, I have received a note from the jury which reads as follows:

"Your Honor, the jury respectfully requests a copy of Mr. Cohen's letter to Mr. Frankel stating ' Do not release.' Could we also have drafts of the press releases. Thank you, Miss Short."

I would direct Miss Kruger to mark this note from the jury as Court's Exhibit 8.

(Note marked Court's Exhibit No. 8.)

THE COURT: In response to Court's Exhibit 8, I propose to send in to the jury Government's Exhibits 84 in evidence, 87-B, -C, -D and -E, all of which are in evidence.

MR. SEGAL: Your Honor, I would have no objection to 84 in evidence. I believe that conforms to it -- nor of 87-B, and I believe that conforms to it.

With regard to 87-C, I would propose that if there is -- that in order to conform with the press release request that only the actual document relating to the draft of the press release and not the appended exhibits, which is a Phone-O-Gram with the name Stanley Duboff on it and a client form of Bass & Company be submitted. So I would ask that be restricted to merely the draft which appears in 87-C.

MR. BLOCK: I join in that objection.

MR. ROBSON: I join in that objection by Mr. Segal.

THE COURT: I am going to send in the complete exhibit. The exhibit was admitted as a whole and I am not going to attempt to remove portions of it.

You have your exception.

MR. SEGAL: With regard to 87-D, I would object to this entire document since it consists of a public relations record sheet and actual press release, another form sheet of Bass & Company, an additional press release and another form sheet of Bass & Company, and there is an additional press release at the end of it.

No one of the documents contains a draft of anything. These appears to be merely administrative sheets of Bass and the actual press releases.

I, of course, would have no objection to merely the press releases going in, but they have those already. I would object to the cover sheets which are appended to 87-D.

MR. FEFFER: Your Honor, this very clearly, from the notations on it, was a draft, maybe the very last draft that was sent out for approval. It was admitted in evidence and the jury requested it, and I think they should have the entire exhibit they asked for.

MR. ROBSON: I join in Mr. Segal's objection.

MR. BLOCK: I join in it, too, sir.

THE COURT: I note the cover sheet which does indicate, among other things, "Draft by R. Frankel; Date, May 7, 1969."

MR. FEFFER: The testimony was to that effect, as well, your Honor, when it was received.

THE COURT: I am going to overrule counsel's objection and send in 87-D to the jury.

You have your exception.

What about 87-E?

MR. SEGAL: With regard to 87-E, the top page appears to be, again, an administrative sheet, which I would object to. There is a draft on white copy paper with red ink markings, writing, as well as pencil marks,

and I have no objection to that.

Then that is followed by a letter of Barbara Humphrey's, which I would object to. This doesn't in any way conform to it, and particularly since on the reverse side of that document there is a notation which indicated okayed by Cohen and Deutsch, and Albert Malmon, ten copies. I don't believe this is a draft nor does it represent a draft at all.

There is next another administrative, public relations record sheet, which I would object to, and, finally, there is apparently a completed release which is again not a draft.

I would, therefore, object to all of the documents in 87-E with the exception of what is clearly a typewritten and handwritten white copy sheet with red ink notations.

THE COURT: Mr. Block?

MR. BLOCK: I just wanted to look at this. your Honor, for a moment.

THE COURT: Of course.

(Pause.)

MR. BLOCK: Your Honor, I have n o objection to this document, 87-E.

MR. ROBSON: I join in Mr. Segal's objection, your Honor.

THE COURT: The objection to 87-E made by Mr. Segal and joined in by Mr. Robson is overruled.

I am not going to remove a portion of the exhibit. I am going to send in the entire exhibit as it was received in evidence. You gentlemen have your exceptions.

Miss Kruger, would you deliver 84 and 87-B,-C,-D and -E to the marshal?

THE CLERK: Yes, your Honor.

THE COURT: Thank you, gentlemen.

(Recess.)

(At 11:50 a.m., a note was received from the jury.) (In open court; jury not present.)

THE COURT: Gentlemen, I have received another note from the jury and the note reads as follows:

"Your Honor, the jury respectfully requests Government's Exhibit 50 and Duboff's Exhibit Y. Thank you, Miss Short."

Miss Kruger, would you mark this as Court's Exhibit 9, please.

(Note marked Court's Exhibit No. 9.)

THE COURT: I have been handed Government's Exhibit 50, which is in evidence, and Defendant Duboff's Exhibit Y, which is in evidence. I am prepared to send both

of these exhibits to the jury in response to the jury's request.

Is there any objection?

MR. ORENSTEIN: All counsel concur.

THE COURT: All counsel consent.

Miss Kruger, give these two exhibits to the marshal and have him give them to the jury.

(Recess.)

(At 12:20 p.m., a note was received from the jury.)

(In open court; jury not present.)

THE COURT: Gentlemen, I have received another note from the jury which reads as follows:

"Your Honor, if a count consists of several points (i.e., A, B, C, or 1, 2, 3, etc.), and we reach a verdict on one point, is the charge that: The entire count is found accordingly? Miss Short."

I direct that this note be marked Court's Exhibit 10 for identification.

(Note marked Court's Exhibit No. 10.)

THE COURT: Gentlemen, I suggest that since the jury has now gone to lunch, we consider a response to this ntoe in the form of a note going into the jury inquiring, in substance, which count or counts the jury is referring

to, because I can see a difference in the response we would make if the jury were inquiring about the conspiracy count as opposed to the substantive court.

Therefore, I would ask that you all think on the subject of the note and the response we would give the jury and I will meet you back here in the courtroom at five minutes of 2:00, since the jury is due back from lunch at approximately 2:00 o'clock.

Is that satisfactory?

MR. SEGAL: Yes, your Honor.

MR. FEFFER: Yes, your Honor.

(Recess.)

(2:00 p.m.: In open court; jury not present.)

THE COURT: Good afternoon, gentlemen. When we recessed, I asked counsel to return at five minutes of 2:00, before the jury got back from lunch, and so far as I know the jury is not yet back from lunch, and the reason for my request was to consider further the note received from the jury as they were going out to lunch, which is Court's Exhibit 10.

The way we left it, the Court will send a note in to the jury, which I have written out, and which would read as follows:

"June 7, 1974, 2:00 p.m. Members of the jury,

Which count or counts are you referring to? Judge Ward."

You have had an opportunity to consider the matter during the luncheon period. Is there any counsel who finds that this would be objectionable as a first-step response to the jury's note?

MR. BLOCK: Yes, your Honor. I believe that all counsel agree that the answer to the note should be "no."

THE COURT: Well, before lunch you all agreed that it should be "yes."

MR. BLOCK: We have discussed it and we have changed our minds.

I might point out, in support of that, that I would like to direct your Honor's attention, for example, to a couple of subsections of Paragraph 11 in the conspiracy count, which is the means, and if your Honor would look, for example at Paragraph B, 11-B, or 11-C, it could be that the jury is focusing on those paragraphs which are not really directly involved in the possible overall conspiracy that they could find, and I think there are similar paragraphs elsewhere, like, for example, -D.

That is my view, and undoubtedly my colleagues have something to add.

THE COURT: What harm would be done by my making the interim inquiry?

MR. BLOCK: I don't think it would solve the problem.

Suppose they come back and say it is Counts 1, 2 and 3, or all the counts? You still would have the same problem.

THE COURT: Suppose they are considering the conspiracy count?

MR. BLOCK: Then we still have that problem.

THE COURT: I think there may be a different response depending on whether they are considering the conspiracy count or one of the three substantive counts.

MR. BLOCK: The substantive counts incorporate by reference the conspiracy count --

MR. SEGAL: I agree that the answer has to be "no," under the circumstances.

In assessing this note, we felt that the initial effort to determine which of the paragraphs the jury may be addressing their inquiry to would still leave us with the same dilemma, because if it is to Count 1, we do not know what paragraph the jury is talking about, we do not know if the charging paragraph to which they may be referring is an integral part of another paragraph, or if because of the kind of exhibits they have asked about, namely, exhibits which relate, in part at least, to misrepresentations,

whether or not that jury may not be concluding that because they find that there may be false statements in some of the press releases or in the back-up material, the drafts of the press releases, that if they find there are false statements there that that in some way allows them to reach a conclusion that, therefore, a paragraph or a portion of Count 1 is proven.

Now, that is not so. The fact that there is a false statement on the draft or a false statement, as they determine it, on the actual press release, doesn't mean that thereby a conspiracy to use false statements in the sale of securities has been reached.

So we will really not be throwing any light on it if we inquire further into what the jury is thinking about and we can only muddy the waters, and since we don't know which of the charging paragraphs are the basis on which they are asking this inquiry -- because the same problem arises with regard to the substantive counts, the suggestions that no inquiry be made relating to which of the counts they are talking to, but, rather, if anything, the Court should merely reread, if it deems it appropriate, those portions of the charge which relate to the conspiracy and the elements that have to be found on the conspiracy and those portions of the Court's charge which relate to

the substantive counts and the elements which have to be found in the substantive counts, but the nub is that any one paragraph doesn't allow them to reach a conclusion unless they find that the central conspiracy is found, or they may be looking at multiple conspiracy things, with this kind of inquiry.

I think it is too dangerous for us to conjecture. If there is a short answer, it has to be "no," because we don't know what they are talking about. The short answer may very well be merely, instead of asking them where they are, to give them the Court's direction as to what is supposed to be done as far as their considerations are concerned with the elements that have to be found on the conspiracy count, and those elements which have to be found on the substantive counts, and no more, and let them go back then and resolve for themselves.

Once we start to give them "yeses" or "noes," we are perhaps undercutting the whole thrust of what it is they have to find, namely, that there was a conspiracy to manipulate or deliver false statements, et cetera, or a substantive count whose objective was a particular item, and it is for that reason that what seemed to be a simple solution to the problem has been reversed in our thinking and the suggestion made is the one I have indicated.

MR. ROBSON: I have nothing to add to what Mr. Segal said, your Honor.

We discussed this and this is our combined opinion. The only thing I would add is that I think there should be read to the jury that portion of the charge which dealt with multiple conspiracies.

THE COURT: I don't know why you gentlemen unanimously decline what I think is a very reasonable suggestion, to find out what counts they are talking about, and then we can deal with it.

I heard comments now, "Tell them about the conspiracy count," and if they are interested in the conspiracy count, I will them them about that, but I can't guess either, and my attempt is to gain enlightenment, which is by a suggested note, to find out which counts they are talking about, and I may get no enlightenment, but that seems to result in you gentlemen telling me you guess they must be talking about single or multiple conspiracies.

They might be talking about Count 4, for all I know.

MR. ROBSON: They could be talking about any count or paragraph, and rather than highlight anything, we think giving them the elements of both the conspiracy

and the substantive counts will cover everything they need to know.

THE COURT: Mr. Feffer?

MR. FEFFER: Your Honor, I have no objection to the note, basically. I think, for example, the note in itself may not be necessary because, for example, take Count 2, I think the same answers would be given by the Court with respect to Count 2 and I think you already gave it in your charge, that they have only to find one of the mailings there.

Count 3 contains only one mailing.

With respect to Count 4, you take the five numbered items in Count 4 and you only have to find one of those.

So, I think the answer the Court would give would be the same regardless of whether it was Counts 1, 2, 3 or 4.

THE COURT: What do you suggest the answer should be?

MR. FEFFER: Precisely as your Honor charged already and as the Court has taken from the charge before the luncheon recess, and that is the relevant portion to be given to the jury.

I have no objection to the note going in,

because if they are actually concerned with the conspiracy count and they tell your Honor that, then I would agree with Mr. Segal, that the points we picked out before lunch should be read to them, but I think it is a useless exercise to sit here and read the substantive counts, conspiracy counts and other parts of the charge if we can get a simple answer as to what count or counts they are concerned with.

THE COURT: Just taking what happened before lunch and after lunch leads me to conclude that the question in its present form is confusing to us.

The only simple way I can suggest any enlightenment is the note which I proffered and unless someone can show me where that is prejudicial in some way, I will send this note in to the jury when they return, which is, again, "Which count or counts are you referring to?"

MR. SEGAL: Your Honor, the note is unexceptional. I don't except to it.

All I am saying is that we are going to be right back here with the very thing we are discussing --

THE COURT: If they say Count 1, then we can take and focus on the matter of the conspiracy count.

If they say all the counts, I grant you, we are probably in the same posture we are in now, and if they say

one or more of the substantive counts, we may also be able to assist them, and the purpose of my sending the note in is, frankly, to attempt enlightenment, and I wanted to do it in a way which is not suggestive or to slant matters in any way and, therefore, I thought the suggestion which we had discussed just before we broke for lunch, which basically was to do it in two setps, made a lot of sense.

I will hear you, once the response comes out.

MR. SEGAL: Your Honor, the only problem I have is that this jury can't be wise enough -- impossible for it to be wise enough, to know they may have different considerations relating to Count 1 than they would have to Counts 2, 3 and 4, and if we give them an answer on Count 1, the conspiracy count, and they only have to find as the count reads, one element, and therefore they get the whole conspiracy count, they may reach that same conclusion with regard to 2, 3 and 4, and that would be an erroneous conclusion, because their feeling may be that there are just different counts charging different charges, and not appreciate that under the law they have an obligation to do more than with regard to the substantive counts, and for tha t reason, if we query what count it is, particularly when we know they are thinking like this, and

they come back and say it is the conspiracy count, yes, it enables us to tell them what they should consider, but what I am concerned with, what we are all concerned with, I think, is that they may use that in relating to their determination of 2, 3 and 4.

THE COURT: Let me make a suggestion: I would add a first sentence to the note, which I think you will find unexceptional:

"There are different considerations governing the various counts. Which count or counts are you referring to?"

We do agree there are different considerations governing the various counts. I would be willing to do that, because there are, and I can't say that they are identical.

MR. SCHATTEN: Your Honor, I have a hearing at this time in front of Judge Tyler, and Mr. Feffer has agreed to handle things.

THE COURT: Of course, Mr. Schatten. Good luck.

What about that, making the note, and I will take language from you, "There are different considerations governing the various counts. Which count or counts are you referring to?"

MR. FEFFER: I would object to that, your Honor,

because I don't believe, with respect to the question we have, that there are different considerations for each and every count.

I think, for example, as your Honor charged already quite clearly, that they could find one mailing in Count 2, they could fine one of the four or five elements in Count 4, and that is sufficient on both of those counts. I think that is suggesting just the opposite.

I think we have a note from the jury and we should ask which count they are referring to because this will suggest things that may not be true.

MR. SEGAL: Your Honor, the Government is wrong on the law.

Obviously, this jury is looking at elements and not whether a single mailing count will suffice. What they are looking at and what the Court has already said is "You must find each of three elements in regard to one count." That is where the Government is off in its calculation as to the response here.

When the Court says we agree, I think we agree because we are really focusing on a juror saying, "What do I have to find as to Count 1 or 2?"

As the Court indicates, those two sentences it has proposed, is something we would agree to.

THE COURT: You would agree to that?

MR. SEGAL: To the note the Court read with the two sentences.

MR. BLOCK: Yes, sir.

MR. ROBSON: I will accept that, your Honor.

THE COURT: We are sending in a note with those two sentences. I will rewrite the note and read it to you as soon as it is done.

(Pause.)

THE COURT: I have prepared the following note:

"June 7, 1974, 2:15 p.m. Members of the jury: There are different considerations governing the various counts. Which count or counts are you referring to? Judge Ward."

I suggest that we send the Court's note back in to the jury with their note, so that they have the two things together.

Is that satisfactory?

MR. SEGAL: Yes, your Honor.

MR. BLOCK: Yes, your Honor.

MR. SEGAL: Your Honor, what number is the jury's request?

THE COURT: Count's Exhibit 10 for identification.

MR. SEGAL: What number request is that, the

first, second, third?

THE COURT: Do you want to mark the note?

MR. SEGAL: Yes, your Honor.

(ff the record.

(Discussion off the record.)

THE COURT: Miss Kruger, would you check and advise Mr. Segal of the number of requests?

Would you mark the note which is going in to the jury, handwritten by the Court, as Court's Exhibit 11 for identification.

Is that agreeable, gentlemen?

MR. SEGAL: Yes.

MR. BLOCK: Maybe it should be done after it comes back out.

THE COURT: Let's wait. Send it in and when we get it back, Mr. Block, we will mark it.

(Recess.)

(4:05 p.m.: In open court; jury present.)

THE COURT: Good afternoon, ladies and gentlemen.

THE CLERK: Members of the jury, will you please answer as your name is called.

(Roll called - all present.)

THE CLERK: Madam Forelady, has the jury agreed upon a verdict?

THE FORELADY: They have.

THE CLERK: What is your verdict as to Milton Cohen, Count 1?

THE FORELADY: Guilty.

THE CLERK: As to Bernard Deutsch, Count 1?

THE FORELADY: Guilty.

THE CLERK: As to Stanley Duboff, Count 1?

THE FORELADY: Guilty.

THE CLERK: How do you find as to Milton Cohen on Count 2?

THE FORELADY: Guilty.

THE CLERK: Bernard Deutsch, Count 2?

THE FORELADY: Guilty.

THE CLERK: Stanley Duboff, Count 2?

THE FORELADY: Guilty.

THE CLERK: Milton Cohen, Count 3?

THE FORELADY: Guilty.

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THE CLERK: Bernard Deutsch, Count 3?

THE FORELADY: Guilty.

THE CLERK: Stanley Duboff, Count 3?

THE FORELADY: Guilty.

THE CLERK: Milton Cohen as to Count 4?

THE FORELADY: Guilty.

THE CLERK: Bernard Deutsch, Count 4?

THE FORELADY: Guilty.

THE CLERK: Stanley Duboff, Count 4?

THE FORELADY: Guilty.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it now stands recorded.

You find the defendants Milton Cohen, Bernard Deutsch and Stanley Duboff guilty on all counts, Counts 1,2,3 and 4, and so say you all.

THE FORELADY: So say we all.

MR. SEGAL: Your Honor, may the jury be polled, please?

THE COURT: Indeed.

Miss Kruger, would you poll the jury, please?

THE CLERK: Ladies and gentlemen of the jury, you find all defendants, Milton Cohen, Bernard Deutsch and Stanley Duboff guilty as charged in all four counts.

(Each juror, upon being asked, "Is that your

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verdict," replied in the affirmative.)

THE CLERK: So say you all.

THE COURT: Miss Kruger, would you take from our forelady the form verdict, which I assume has been filled out and signed, and would you file it as the next Court's exhibit.

(Court's Exhibit No. 11 was marked.)

THE COURT: Ladies and Mr. Caruso, this has been a long trial. You have seen many witnesses. You have been shown, had read to you many exhibits. We started this case on April 23, 1974. This is now June 7, 1974.

This jury was one of the most devoted juries I have had the experience to work with, either as a lawyer or as a judge. Every morning when you were supposed to be here -- and I include your four colleagues who are no longer will you -- all sixteen were here. Through days that were long, sometimes hot, you sat and paid strict attention to everything that occurred.

A normal tour of jury service is two weeks. You served much longer than that. You served loyally; your service was much appreciated by the Court.

I know I have received two notes from two of the jurors and letters will go out on those to employers and to the individuals because I know that employers also have

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UNITED STATES OF AMERICA

v. 74 Cr.447

MILTON COHEN, et al.

June 12, 1974
10:05 a.m.

ELLIOT G. SAGOR, Esq.,
Attorney for the Government.

- - -

MR. SAGOR: Ready for the Government, your Honor.

THE COURT: I want to thank you gentlemen for assembling on what was relatively short notice. The reason I asked you to assemble this morning was that when we recessed on Friday, there was one matter open which I indicated I would try to get to as promptly as possible, and that was my review of the grand jury minutes, which I indicated on Friday had been turned over to me by the Government a day or so before, but had not been reviewed by me.

Since we last met, I have read through the grand jury minutes which were presented to me by the Government.

Before I go forward, I would like one representation from the Government, which was not necessarily clear to me from the grand jury minutes, since the testimony which I

reviewed began as early as May 23, 1973, and some was presented as late as November 20, 1973. I want to be certain that all of the testimony was presented to the same grand jury.

MR. SAGOR: Your Honor, my name is Elliot Sagor. Mr. Feffer, as you know, had to be away. I checked with my colleague and co-counsel, Mr. Schatten, and we are just not sure, your Honor. We will have to find out by the end of the day if it was a longer grand jury than thirty days. If it was not, then obviously the earlier testimony could not have been presented to the jury. If it was, it usually is stamped on the face, but sometimes, unfortunately, it is marked on a little piece of paper affixed to the exhibit which sometimes falls off. We will have to check further.

It may well be, whether the earlier testimony was presented or not, there may well be more than sufficient evidence on material that obviously was before the grand jury.

THE COURT: I am commenting on the aggregate, although, as I say, some of the minutes on their upper left-hand corner indicated the identity of the grand jury, and among those are minutes which were made available to the defense in the form of 3500 material.

I had noted, for example, that Government's

Exhibit 3508, which is the testimony of Alvin S. Malmon on June 8, 1973, in the upper left-hand corner of Page 1, it says "r-e-g jury."

The transcript of Government's Exhibit 3501, which is the testimony of Hugh W. Deane, which appears to have been given on November 2, 1973, says, in the upper left-hand corner, "O-c-t apostrophe 72 s-p."

That would appear to me to indicate an October 1972 special grand jury.

Those are the only designations which appear on the transcripts I have been given.

There are some transcripts in the group which do not contain any specific designation.

I think it would be appropriate, Mr. Sagor and Mr. Schatten, if I note for the record by name, by date and where it is 3500 material by 3500 exhibit number, and where it is not 3500 material by the number of pages of testimony, the material which I read.

In other words, I want it identified in that way. I would expect to give the name of the witness, date of the transcript, and either the 3500 number of, where it was not 3500 material, the number of pages. I think this will, for the record, identify the material which I looked at.

Is that satisfactory?

MR. SAGOR: Yes, your Honor.

THE COURT: The material which I looked at included testimony of Alvin S. Malmon on June 8, 1973, Government's Exhibit 3508; testimony of Hugh W. Deane on November 2, 1973, Government's Exhibit 3501; testimony of Georgia M. Nelson on May 1, 1973, Government's Exhibit 3512; testimony of Bernard Shwidock on November 8, 1973, Government's Exhibit 3519; testimony of Bernard Shwidock on November 16, 1973, Government's Exhibit 3518; additional testimony of Bernard Shwidock on November 16, 1973, Government's Exhibit 3517; testimony of Stewart Schiffman, dated October 31, 1973, consisting of ten pages; testimony of John R. Hurley, dated October 26, 1973, which is Government's Exhibit 3545; testimony of John M. Butler, who is described, at least in part, as vice-president and apparently general counsel of Financial Programs, dated September 26, 1973, consisting, by my count, of forty-one pages; testimony of Lambert Hirsheimer, who, as you gentlemen will recall from the trial testimony, had been with Financial Programs, dated September 20, 1973, consisting of twenty-five pages; testimony of Jules Moskowitz of the SEC on three separate dates, dated November 9, 1973, consisting of twenty-nine pages, November 28, 1973, consisting of seven pages, and November 20, 1973, consisting of eight

pages; the testimony of Fred Paul Mazzeo, dated November 16, 1973, which is Government's Exhibit 3569; testimony of George Van Aken, who had been with a company called International Venture Corporation. Mr. Van Aken testified on a number of matters and included in his testimony are matters which would be germane to the case tried here. That testimony was given on May 23, 1973 and consists of thirty-four pages.

Next, testimony of Charles Joseph Peters, who is identified as a one-time commission salesman for the firm of R. J. Rosen. That testimony is dated September 6, 1973 and consists of twenty-two pages. A portion of that testimony was germane to the issues which were presented at the trial of this case.

The testimony of Leonard Thun, who was identified as president of Acrite Industries. The testimony was given on May 8, 1973 and consists, by my count, of forty-four pages, with the last page being designed 43a. A portion of Mr. Thun's testimony relates to the Richard Packing matter which was the subject of the trial before me.

Finally, the testimony of Raymond Weiss, whose name is familiar, I believe, to you gentlemen, who had been with Allessandrini & Company, and that testimony is dated September 26, 1973, and consists, by my count of

nine pages.

MR. SCHATTEN: Your Honor, may you give us the date, once again, of the Mazzeo testimony?

THE COURT: Yes.

MR. BLOCK: 11/16/73.

THE COURT: November 16, 1973.

MR. SCHATTEN: Thank you, your Honor.

MR. SEGAL: Your Honor, during the course of the trial, there was one day when we had received testimony of Mr. Anton. Was that not given to your Honor?

MR. SCHATTEN: My understanding is that that was not grand jury testimony, your Honor. I believe Mr. Anton testified before the SEC.

MR. BLOCK: I h[illegible] I could look.

THE COURT: You may do so, Mr. Block.

I may say I have given you a complete rundown of the material given to me.

MR. ROBSON: Mr. Schatten may be right. It may be SEC testimony.

THE COURT: Off the record.

(Discussion off the record.)

MR. SEGAL: We have 3538, your Honor, which is Mr. Anton before the Securities and Exchange Commission.

THE COURT: That was SEC?

MR. SEGAL: That is at least one transcript.

This is the long one, which may very well have been interpreted as grand jury testimony.

MR. BLOCK: I don't have anything on that, your Honor.

MR. SEGAL: That may be it, your Honor. It may have been this long SEC transcript.

THE COURT: In any event, gentlemen, the material I have described to you is the material given to me by the Government and which I have read.

After having read the material which I have just described, I have concluded that on the basis of this material the Government made out a prima facie case supporting the four counts of the information which, in turn, was a reduction in size of a sixteen-count indictment filed by the grand jury. The information and the indictment are, in my judgment, identical so far as the charges are concerned. So that, really, what I am saying is that the evidence presented supports both the original indictment of sixteen counts and the superseding information of four counts.

The one matter which remains open is that I have viewed the evidence which I have read as having been

presented to one grand jury. Therefore, it will be necessary for the Government to identify which of the material was before the grand jury which voted the indictment, which later was waived and turned into the information on which we went to trial.

There is one other matter. I reviewed the grand jury testimony with a view to seeing whether there was any material there, particularly in the transcripts which were not made available to the defense, that is, the testimony of Stewart Schiffman, John M. Butler, Lambert Hirsheimer, Jules Moskowitz, George Van Aken, Charles Joseph Peters, Leonard Thun and Raymond Weiss, which could be considered Brady material.

I found no material which could be considered Brady material in the record which was not already made known to the defense within the ambit of the Government exhibits which have been identified here as 3500 material, and which was turned over to the defense.

So that I have concluded initially two things, that a prima facie case was presented and that there is no Brady material contained herein which the defense has not seen or was not given.

That leaves me with the one open matter, which is to ascertain from the Government which of the

identified testimony was heard by the grand jury which voted the indictment, which later became the information on which we went to trial.

I would hear from counsel on this matter.

MR. SAGOR: The Government, by the end of the week, will present, with copies to counsel, a letter to the Court, and if your Honor's ruling is unchanged, perhaps at the time of sentence your Honor will note for the record "unchanged" as opposed to meeting again, but we do want to contact Mr. Feffer, of course, and be certain of what we are representing.

We will have it as soon as possible. If it can be done today, we will send it today.

THE COURT: Very well. I understand your point.

As I indicated, the transcripts make it appear testimony was presented before one grand jury which was denominated a special grand jury, and another which appears to have been denominated a regular grand jury.

MR. SAGOR: Especially since it is not marked on the face of the exhibit, and I am glad your Honor gives us the opportunity to double-check.

THE COURT: In that regard, so that the record is clear, there are a couple of transcripts so stamped, and I think I should put that into the record now. I am glad

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you reminded me of that.

The transcript of the testimony of George Van Aken is stamped on its face Exhibit No. -- it looks like 2 -- and what appear to be initials, perhaps PSK, but there could be an error on the initials, and below that, "August 31, 1973, U.S. Grand Jury SDNY."

MR. BLOCK: Your Honor, I didn't get which testimony that was.

THE COURT: That was the testimony of George Van Aken.

MR. BLOCK: An exhibit on August 31, 1973?

THE COURT: That is correct.

In addition, the transcript of the testimony of Leonard Thun is stamped Exhibit No. 1, again with initials I cannot make out, and under that,"August 30, 1973, U.S. Grand Jury SDNY."

MR. BLOCK: May I say something, your Honor?

THE COURT: You may, Mr. Block.

MR. BLOCK: I don't quite understand the reliance on Mr. Feffer. My understanding is that Mr. Feffer only came into the case after the return of the indictment and I believe it was Mr. Walker who presented this case to the grand jury.

In the second place, it seems to me, your Honor,

that the best evidence as to what took place before the grand jury and as to whether -- and I think most significantly -- whether, for example, the testimony of Mr. Malmon given in June was brought to the attention of the indicting grand jury -- I don't have the date when the indictment was returned --

MR. ROBSON: In the middle of December.

MR. BLOCK: Whether the grand jury that voted the indictment had before it as an exhibit the testimony of Malmon, I think is a crucial thing here, and it seems to me that the best evidence of that would be the minutes which are kept by the secretary of the grand jury and which I would think are readily obtainable from the grand jury reporters.

I don't see why we have to wait in suspense on a thing like this which is so vital to the interests of the defendants in the case.

THE COURT: Let me hear if there are any other comments from the other defense counsel before we hear from the Government in response to all comments.

MR. SAGOR: I would suggest, your Honor, we would find out. Obviously, the best place to look are the minutes. We will ask Mr. Feffer and he may know it is not so, or we will find out from Mr. Walker. Sometimes the

minutes are not transcribed, but we will find out.

MR. SEGAL: Your Honor, the initial comment that I would make is that the motion made in the course of the trail was whether or not the charges upon which we were being tried in this courtroom, as fleshed out in this courtroom, were the same items and was the same material which had been presented to the grand jury initially, which is slightly to the side of the finding that there was a prima facie case made out before the grand jury, because --

THE COURT: On all of the counts. So that inherent in that, if you want it made clear for the record, there is support in this total group of minutes for the charges as this case was tried.

There were additional witnesses, as you can appreciate, called at the trial. But assume the grand jury minutes to be the skeleton, the entire skeleton, and that is, in this Court's judgment, present. The skeleton did not have on the flesh and skin, and that was added, I would suggest, but I found in the totality of these minutes the necessary elements to support all of the counts which were presented here and which were given to the jury.

MR. SEGAL: Your Honor, we merely press the comment, and that is that it is our belief that a prima

facie case having been made out before the grand jury which returned an indictment which was unspecific, namely, an indictment which spoke merely to the words of the statute without any particulars included, as opposed to the trial of this case which included material we felt was newly arrived at and had never been presented to the grand jury, is the nub of what our motion was.

We were saying, essentially, that regardless of what that grand jury heard, what the trial of this case was was different from what that grand jury heard. That grand jury may have heard sufficient evidence to return an indictment general in terms in the nature of the indictment we had in this case, but these defendants were entitled to be tried on the basis of the same material -- not the identical material, but at least the same material that was presented to the grand jury.

Otherwise, your Honor, it would be possible for the Government to present two types of cases, one to a grand jury, and then come into a courtroom and try another case. In effect, the Government would be conceiving its own case at the very trial, and that was the nub of what it was we were asking the Court to review.

Secondly, as the Court understands and knows, there have been five indictments. Of necessity, the

Government was presenting a conglomerate of material to a number of sitting bodies, and that, of course, is something we will find out.

The question becomes whether it is the quantity rather than the quality that the grand jury is acting on and query whether or not having heard materials with regard to each of the other four, including this one, that grand jury is reaching an opinion which is an ordered opinion based on what it is hearing on this case, or whether it is a type of consideration in which this falls along with the other, and for that idea I would cite some of the 3500 material that we did see, and that would indicate that there had been interrogation of a witness as to Stocks A, B and C, and then a question occasionally, "Now, does that same thing apply to Richard Packing," and there would be a "yes" answer, and that was it.

So that we were concerned about that type of information and that type of decisional bases for a grand jury, and whether or not they are making up their minds on Richard Packing or they are making up their minds on what is a plethora of material which may be confusing and unspecific enough so that the grand jury is not really considering a specific case, and we would urge that these defendants, as is their right, are entitled to have each

matter separately considered, or at least segregated to be considered separately, even if, of necessity, the witnesses lap over and speak about a number of cases.

The third thing that comes to mind is, in looking at the dates of Mr. Moskowitz' testimony, November 9th, November 20th, and November 28th, Moskowitz' testimony, I have to conclude, is hearsay testimony before that grand jury --

THE COURT: Not where related to admissions, which was part of the testimony.

MR. SEGAL: I see.

THE COURT: There are admissions contained therein. I would mention that to you because I recognize when someone known to you and known to the Court as an employee of the Securities and Exchange Commission testifies, you might immediately conclude that it was all hearsay, but there are admissions made to Mr. Moskowitz.

MR. SEGAL: I see.

Then, speaking as I am, without knowledge of what is contained in the grand jury minutes, I would just point to that factor to determine whether or not the grand jury which indicted was the grand jury before whom this Moskowitz material was presented, and the question is whether or not it was also the grand jury that hears suf-

ficient evidence in and of itself to reach a conclusion.

My thought is that having presented to a number of bod' s, the Government was then forced to present some coherent picture to one body, or at least try to do so, and what they may have done, from just looking at this list, is to take some Shwidock testimony on November 8th and November 16th, slug just the Shwidock testimony into that grand jury, and then lard it over with Moskowitz, and at that point bake their own cake, and we would ask the Court to examine that particular factor.

THE COURT: Well, I think I have indicated in my prior statements that the Government has been requested to indicate which of the material which I have reviewed was before the grand jury which voted the indictment which then became the information in this case.

Is there anything else, Mr. Segal?

MR. SEGAL: I believe that is it, your Honor.

The last note I made to myself is just the complete grand jury minutes versus the portions, and I believe I have covered that point in some little detail prior to this, and I believe that is really the basis that we would ask the Court to consider this motion on.

THE COURT: I would suggest that point is one you might want to put into the motion papers which you are

preparing for submission a week from this Friday.

I do not agree with the proposition which you urge here, that only one matter may be presented to a grand jury as opposed to a trial jury. I have difficulty accepting that legal argument, and I think if you have any hope to prevail on it, you might want to incorporate that argument into your motion and support it, if you can, with some cases or other material.

I don't recall, sitting here now, that I have ever really sat down and read a case where that particular point was articulated.

MR. SEGAL: I am saying, your Honor, not that the Government is bound to present one item at a time. As a practical matter, we know one grand jury sits and this is as to a number of disparate matters, but as to this case it is whether or not this grand jury can be presented three or four indictments, having heard a spectrum of witnesses come in talking about a spectrum of cases or a spectrum of stock situations. That is really what I am saying.

So long as that jury reaches a conclusion on the basis of what is before it and can intelligently untangle the tangle, then I have no quarrel with the fact of the jury hearing multiple situations at the same time. It is

merely on what basis are they making up their minds and how they are doing it, very much as a court of appeals will say at different times, "We don't know what the jury decided, but if they decided on this basis, then it is no good and we won't guess about the basis of their decision, and therefore try it again or toss it out."

On what basis did the grand jury, just as the pettit jury, make up its mind, and if its decision can't be untangled, we would say the same relief the court of appeals administeres in the situation I cited could possibly be considered in this situation.

MR. ROBSON: Your Honor, I would like to expand briefly on what Mr. Segal said.

Before I get to that, however, Mr. Sagor suggested that perhaps at thetime of the sentence your Honor could advise us what our position was with respect to this motion after learning when the various witnesses appeared before the grand juries.

I think I would like, one, to know what the finding is by Mr. Sagor, and then to have your Honor's ruling as soon as possible in order to have an opportunity to review it.

THE COURT: You will note I tried to review the testimony and present my views to you as early as possible, and I would continue in the same vein.

So that, Mr. Sagor, if you, by letter, would advise counsel, I would then suggest that I would give you gentlemen the option of my calling you in again or my writing you a brief letter. I think it is better, although it is a slight inconvenience to you, if I call you in.

Do you have a preference, Mr. Robson?

MR. ROBSON: I don't, really. I think at that point it might be sufficient if we are only talking about one or two witnesses who were not before the grand jury, if you would simply advise us of the fact that you adhere to your decision. If there is a substantial discrepancy between the group of witnesses you have and those who appeared before the grand jury, perhaps we might want an opportunity to be present.

THE COURT: I would suggest, just scanning the dates, that the bulk of the testimony was presented between late September and late November 1973. I just mention that as a recap of what I had said earlier, and I will await the report from the Government and will thereafter advise you.

If my advice is brief, I think we can do it in some written form. I might either write a letter of file a very brief memorandum and order which might be helpful to you, and, of course, see to it that each of you received

a copy.

MR. ROBSON: I would like to expand on what Mr. Segal said, because I find myself feeling somewhat thwarted by the Court's decision -- you may have intended to, and perhaps you have, but I don't feel it is directed really to the problem I see and the objection I had in the trial of this case, and I think I can explain it best by using what I consider to be the critical example of what transpired.

The principal misrepresentation, as set forth by the Government on several occasions during the trial, and Mr. Feffer stated this was the essence of the Government's case, was the misrepresentation relating to the number of franchises sold, whether or not that many had been sold, the press releases, and so forth. The significance of that piece of testimony, that testimony in the trial, I think was highlighted by the exhibits requested by that jury. The only exhibits that related to misrepresentation that they ever asked for was the annual report and the April 1970 press release, which dealt specifically with a 200 franchise representation.

It is my position and my theory and I think it is what Mr. Segal and Mr. Block have been uring all along, that where a basic misrepresentation is charged by a grand

jury as the basis for the crime, that the Government is obligated to try that case, that misrepresentation. This is not to say that the misrepresentation can't be fleshed out and there can't be supportive material presented, but I don't think that these defendants can be tried on a charge before the grand jury which doesn't relate, for example, to those 200 franchises. If the grand jury was not presented with evidence of the statements that 200 franchises were sold and evidence that there was no such sale, and from what your Honor read to me, I can see there was no testimony before any grand jury that no such sales were ever made, because none of the witnesses related to the negative aspect of that representation appeared before the grand jury.

What happens is, we have been convicted possibly -- and it looks pretty likely -- on the basis of one major misrepresentation which the grand jury never heard, and I don't think that a charge of general misrepresentation constitutes a skeleton on which the Government then has the right to lay flesh and muscle as it goes along in the form of representations or misrepresentations that they conceive as they go along during the trial, because then we are being faced with a trial on charges which the grand jury never considered, and that really is the heart of our

motion, not that the grand jury may not have had sufficient evidence to warrant an indictment, that is, sufficient prima facie evidence, but, rather, that the evidence that they had was evidence of a case completely different from the evidence to support conviction in this case, and I think the 200-franchise item is really the critical one, because I have a feeling that on the misrepresentation aspect that is what these defendants were convicted on.

MR. BLOCK: Your Honor, may I say one more thing?

THE COURT: Yes, Mr. Block.

MR. BLOCK: Your Honor spoke about admissions testified to by Mr. Moskowitz and I am just wondering whether your Honor had in mind that testimony merely with respect to an admission by a defendant in the absence of other evidence adduced before the grand jury would not, in and of itself, be enough to make out a prima facie case.

I think that is a sound proposition of law, and I think that goes back to the Opper case in the Supreme Court, and all I wanted to say was that I trust your Honor had that in mind in considering the testimony, because what I am thinking about is that if you assume, for example, that the testimony of Malmon was not brought to the attention of the grand jury which returned the indictment, as to the testimony of Moskowitz about admissions, I think

that would be insufficient corroboration or insufficient proof of the commission of a crime, and, therefore, there would not be a prima facie case, despite the admissions.

That is the only point I want to make, your Honor.

THE COURT: I would be inclined to disagree with the last point that you made, Mr. Bloc, but obviously this is a matter which I will consider further.

Just one moment, and I will hear if the Government has anything they wish to say.

(Pause.)

THE COURT: Mr. Sagor, is there anything you wish to say before we recess?

MR. SAGOR: No, your Honor.

THE COURT: Then I will expect to receive a communication from Mr.Sagor or from Mr. Feffer, if he is back in a day or so, with copies to all counsel, indicating the witnesses and testimony which was presented to the grand jury which voted the indictment.

I have in mind the arguments of counsel, as made this morning, and I will be considering them, and, finally, I would suggest, Mr. Segal, on this point that you made orally about the mass of material being presented to the grand jury, that you incorporate that together with authorities

in the motion which I know you will be presenting.

Is that satisfactory?

MR. SEGAL: Yes, your Honor.

THE COURT: The purpose for which this Court was convened this morning having been achieved, in part anyway, we stand adjourned.

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THE COURT: We begin with Mr. Cohen's case and then we will proceed to Mr. Duboff's case.

I would suggest that the first order of business would be the motions which counsel requested and the Court agreed would be deferred and presented orally this morning.

MR. BLOCK: I would like to address myself, in the first instance, your Honor, to the motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure and of course the rule states that the Court may grant a new trial in the interest of justice and the cases talk about a new trial having to be ordered for errors in the course of the trial which deprived the defendant of a fair trial and because the verdict, if that is the case, was against the weight of the evidence, and it seems to me, your Honor, that that rule essentially is a rule that is directed to the conscience of the Court in connection with evaluating the question of whether or not a defendant received a fair trial and it is my submission here, your Honor, and I say this with all due respect, that the defendant did not receive a fair trial and, further, that the verdict was against the weight of the evidence.

Now, I have really what I think, and I am arguing this in all seriousness, your Honor, I think I have some bombshells, and one of them -- several of them relate

to the summation of the prosecutor and most noteworthy, I think, is what the prosecutor told the jury with respect to the number of franchises as set forth in the press releases.

I think, your Honor will recall that part of the summation which appears at page 5188 of the transcript. Mr. Feffer said:

"If you take the first press release dealing with the subject of franchises, Exhibit 31B, it set forth that 19 Circus Wagon units have already been received from prospective franchisees," a statement attributed to Mr. Cohen.

Then he went on from there and talked about the number of units referred to in subsequent press releases, to wit, 31C, 31D, 31E and he came to the conclusion, and he said this in the record, your Honor, that as of October of 1969 there were 102 franchises sold, according to the press releases

31E was dated October 14, 1969, he said, and that was a complete distortion because the first press release, 31B, says 19 have been set up, and the next press release, 31C, concludes this way, and I would like to read it to your Honor, last paragraph:

"Richard Packing recently announced it had begun franchising its Circus Wagon fast food drive-in restaurants. The first franchise located in Anaheim, California, opposite Disneyland begins operations this month."

In that announcement Mr. Cohen disclosed a commitment for 19 more Circus Wagons, so that as of July 6, 1969, when 31C came out, there were still 19.

What Mr. Feffer told the jury in summation was that you add up the 19 from the first one and this 19 and you get 38. Then we go to 31D, which is dated August 18th, and the last paragraph of that press release says:

"Richard Packing first Circus Wagon fast food restaurant was recently opened in Anaheim, California, opposite Disneyland. Mr. Cohen reports that the company has received commitments to open 23 other Circus Wagon franchises throughout the country."

Which means there were four more in addition to the 19 previously announced. Mr. Feffer added the 23 to the erroneous 38 figure in arriving at his figure.

Then we come to 31E, the last one, which says, in the last paragraph:

"Richard Packing's first Circus Wagon fast food restaurant was opened recently in Anaheim, California opposite Disneyland. The company has signed agreements to establish 49 additional Circus Wagon franchises throughout the country."

Now, that is as of October 14th. So that the total that the press releases was talking about was 49 and

not the 102 that Mr. Feffer misled the jury about in the calculations that he made.

THE COURT: Mr. Block, my recollection, and you can correct me if I am in error, was twofold.

Number one, in my charge I indicated that the closing arguments of counsel were not evidence, the evidence was what was presented from the witness' mouths and from the exhibits but, even more, I have a recollection that the jury specifically called for and I have a recollection that we sent into them, the press releases so that in fact they had before them the evidence in this regard during their deliberations.

Am I correct in the latter respect?

MR. BLOCK: You are, your Honor, but I have an answer to what your Honor says:

There are cases, as your Honor knows, in which the Second Circuit Court of Appeals have reversed on the basis of misleading and inflammatory summations by government counsel, and it certainly seems to me that with the weight and prestige of his office behind him and telling the jury how he has interpreted the language in these press releases, I don't care if those eleven women and one man on the jury had three days to study those things, they are going to say "Well, this is what Feffer says and that is what it must mean," and that is the advice of this, your Honor, and the unfairness

of it.

Now, there are other statements made in the summation and I draw your Honor's attention to the statement by Mr. Feffer completely without any support in the evidence at page 5238 where in attempting to put Cohen's repayment of very substantial monies to Richard Packing Company in a light that would be favorable to the government, Mr. Feffer told the jury that Cohen had inherited the money; not a shred of evidence about that.

Again, wholly unfair, inflammatory, and I might say in connection with these, your Honor, I remind your Honor I joined in the motion for mistrial at the end of the summations.

THE COURT: Oh, yes, I recall that.

That motion, of course, was denied.

MR. BLOCK: Then I refer your Honor to page 5192 of the transcript where Faris was supposed, according to Mr. Feffer, to have said that they couldn't get adequate financing for the franchises, and page 5192 again, he alluded to Brodcorb's testimony and stated that contracts were being cancelled right and left, that the company was losing money.

Now, I made a point of that after your Honor's charge and I refer your Honor to page 5371 of the transcript where I made an oral request after your Honor had concluded

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his charge and was taking supplemental requests in which I alluded to these two statements which had no basis in the evidence because the evidence, your Honor, shows that there were three cancellations, even on the basis of Brodcorb's papers -- there were three cancellations and that doesn't support a statement "being cancelled right and left."

Furthermore, in connection with the claim that Richard Packing was losing money, I recall too, your Honor, that during Kally's testimony Mr. Feffer attempted to bring out from Kally that he had discussed with Cohen that the company was losing money for several months. However, the conversation took place in August of 1970 and I recall too, your Honor that your Honor excluded the evidence because it was so vague and didn't bear on the time period involved in this case and, yet, these statements are made to this jury without, again, support in the evidence.

I draw your Honor's attention to page 5194 in which the prosecutor got in that at one point, I think in a press release, it was stated that the dune buggies could go on sand and on the beach whereas in some other places it was stated that they would only go on the roads, and that is an example of what we were tried on in this case, and I have a recollection and I must confess candidly, that I have not been able to find it, that at some bench conference I

raised the point, I said, "I bet Mr. Feffer will want to sum up on the question of where the dune buggies can go," and your Honor said he wouldn't allow it, but I have not been able to find it, but anyway, it did come out in the summation and we sit there without being able to do a thing, while the government goes ahead and prejudices my client.

Further than that, I come to this, your Honor:

I say the summation was so unfair as alone to warrant setting this verdict aside, but we go further. Appropriate objection was presented with respect to these things and your Honor stated that the jury's recollection governs, which I submit again doesn't cure the evil that is done by this type of argument.

Now, we come to a more fundamental thing, and this relates to what I claim to be a substantial error, and I say this with all due respect, in your Honor's charge. As I read this information, and I think that the Hammling case, which I cited to your Honor in that letter, has a bearing. As I read this information it seems to me that the whole thrust of this information is that what was wrong here was the offering circular, which was Government's Exhibit 5B, the March 11, 1969 secondary 10,000 offering -- that if there was any scheme to defraud alleged, that the scheme to defraud was in the sale, pursuant to that offering circular,

of stock, and in support of that I call to your Honor's attention that all the mailings related to that particular offering circular and yet we are far beyond that and as your Honor charged the jury on this, that is reversible error, and I say that with all due respect.

I turn to your Honor's charge at page 5284 and 5285 where after your Honor read the conspiracy count and indicated that he was going to talk further about the substantive counts, your Honor then went on to talk about the statutes and you read to the jury 17A of the Securities Act and explained what false representeations meant, but then you go on and you say, in that connection, and this is what I am drawing your Honor's attention to, at line 18, page 5284,

"For example, the government contends that Bernard Deutsch and Milton Cohen through oral statements and press releases made false statements and omitted to state material facts as to the number of franchises sold," and then you go on, "These statements were not only false but they omitted to state material facts," and then you have this passage, "As the government contends that the press release of April 5, 1970, Government's Exhibit 31G, which states in part that Richard Packing had sold 210 franchises by that date was false because the company had sold a smaller number. The government also contends that this estimate was misleading

because it omitted to state that a number of franchises had by that time been cancelled."

Now, there are two things in connection with that:

In the first place, there was no showing -- as a matter of fact, the weight of the evidence sustained the 210 figure regardless of the number of cancellations because there was nothing in this case to show that the 210 figure wasn't a net figure after taking the cancellations into account, and I draw your Honor's attention to the testimony of Mr. Faris in that respect, which was the only testimony that came to grips with the facts as to cancellations and number of franchises sold, but apart from that, your Honor, and this is what I submit is a substantial legal point, Milton Cohen was not a seller of stock except in connection with the 10,000 share offering and therefore, the press release business is all apart from the statutory inhibitions, doesn't have anything to do with it, because he wasn't selling stock thereafter, after March 11th of 1969.

The jury's attention should have been directed to the alleged falsity of the offering circular, and that's it. Your Honor, I think that that objection goes to the heart of the problems that we had with this case during the trial when we were groping to find out what this information was all about.

Now we come to the alleged falsity of the offering circular, and here we have Mr. Feffer making a statement at page 5244 of the summation, he says:

"There was cheap stock on the offering," except that there was no proof whatsoever in this case as to what the market price of Richard Packing was at 3/11/69 when this stock came out and was standing at $28 a share. Your Honor will remember that exhibit, Exhibit 50.

Now, we talk about the offering circular itself, and I say to your Honor that the weight of the evidence here, it seems to me, showed that that offering circular was prepared by Malmon in good faith, that if there were any errors or omissions it cannot be laid at the door of this then maker of hamburger patties.

THE COURT: Mr. Block, you presented the Court with a request to charge which, in essence, sought to urge upon the jury that position. My recollection is that I adopted your request to charge and gave the jury an option in this matter. The jury chose by its verdict of guilty on count 4 to find Mr. Cohen culpable in the matter and I would suggest the jury's verdict in that regard is supported by the evidence presented at trial and must be allowed to stand. For me to do otherwise, in light of my charge and in light of the evidence as I viewed it, and at this point,

needless to say, the evidence must be viewed in a manner most favorable to the government --

MR. BLOCK: That is not true on this motion, your Honor.

THE COURT: I would suggest it is true, but I am not going to argue the point, because I think on any theory, and I will put the theory to the side for the moment, the jury was given that option which you presented in your request to charge and which I charged them and they chose not to put the burden on Mr. Malmon alone, as Mr. Cohen's lawyer, but they chose to find Mr. Cohen guily on count 4, and I think that is very telling and I don't think it is appropriate for the Court at this stage in view of all the evidence to upset the jury's verdict in that regard.

MR. BLOCK: Well, your Honor, I --

THE COURT: I do believe I charged your request almost in hic verba.

MR. BLOCK: You mean with respect to advice of counsel?

THE COURT: Yes.

MR. BLOCK: Yes, you charged that, your Honor, but the trouble with count 4, and this I know affects the other counts as well, is that that chart, Exhibit 50, went in over objection without a shred of proof -- without a shred of proof--

that Mr. Cohen knew anything at all about the distribution. All he knew, pursuant to that letter that he wrote, was that Kelly, Andrews & Bradley was going to be the billing agent and was going to get not less than $28 a share and there was no connection shown whatsoever between Mr. Cohen and the stock that went to Morginstin and Harris, no connection shown, and that, it seems to me, infected the case against Cohen, plus the fact that some of the stock went to the fund, some of the stock went to Kelly, Andrews, and they made a profit, all of this with respect to which, your Honor, and this is a point I have not yet touched on, the unfairness of the evidence that came in along these lines, and I don't have to detail it which led me as Cohen's counsel to make repeated requests for a severence because I contended that Cohen couldn't get a fair trial with all this evidence coming in of all these imaginations by, at least, Deutsch, by Cohen was not privy to in the slightest degree.

I am not going to labor this, your Honor. I think at this point I have said enough to highlight some of the ~~contests~~ contentions we are going to make, if we have to take this up, but there is one -- there are two things I want to call to your Honor's attention -- one thing -- I draw your Honor's attention to Cohen's Exhibit H which came in.

This is a letter in evidence and it is a letter

which Mr. Cohen wrote and it doesn't have a date on it, but I think the date can be inferred, addressed to "Dear Al" who is Malmon, signed by Milton Cohen:

"Spoke to Bernie regarding the stock dividends of May and July. First he has done this many times. Secondly, it is advantageous from the stockholder's point of view and most important of all, he wants all of the funds he deals with to know at once of a double dividend. They are interested in more float of stock and presently maintain that there is not enough stock out."

Now, your Honor, when you look at this in the context of the evidence showing what Deutsch was doing, particularly in connection with the 10,000 share offering, the secret deal he is alleged to have had with Kelly, Andrews, the way the stock was distributed, this letter shows the role that Milton Cohen played in this case, which was that of being an unwitting patsy, at the very most, because everybody knows now, in the light of this evidence in this case, that it is sheer nonsense that the funds were interested in more float of stock. They were not.

It was very clear, they wanted to control the float and why would they want more stock out, and I draw your Honor's attention in that connection with the double game Deutsch was playing because while he tells this to

unsuspecting Milton Cohen, who is convicted unfairly in this case, and Cohen dutifully puts it in a letter to Malmon, Deutsch is at the same time having a conversation with Hurley at which Cohen is not present and in which he tells Hurley, "Well, your know, it is a good idea to have these stock dividends with order amounts of shares because then they get sold" -- do you remember that, your Honor? "Then they get sold and create activity in the stock."

This is the context of this case, this is the atmosphere which led to my client's conviction. It was not the evidence, your Honor, it was the prejudice.

For most reasons, your Honor, and I could go on, but I don't want to wear out the Court -- it is for those reasons that I urge your Honor most strongly to grant the motion for a new trial as to Milton Cohen pursuant to Rule 33 of the Federal Rules of Criminal Procedure in the interes of justice.

With respect to the motion, your Honor decision on the motion for judgment of acquittal. with respect to that motion I am not clear whether your Hor or reserved decision on it because there was pending the question of your decision about the effect of the grand jury minutes -- I think that was the reason --

THE COURT: Yes, it was.

MR. BLOCK: It was. Unless your Honor wants me to argue that in the light of the evidence and the best view of the evidence which has to be granted on the sufficiency point -- there the Brower case comes into play and I took theliberty of calling that case to your Honor's attention because in Brower it was so highlighted that there was this priest, and the Court looked only at what the priest did to determine whether or not he was properly convicted, and I suggest to your Honor that if you look here at what Cohen did by himself in this case, taking the best view of the government's evidence, the evidence is insufficient to justify the jury's verdict on any of the counts, and I am not going to pursue that.

That concludes my argument on the motions, your Honor. Thank you, your Honor.

THE COURT: Thank you, Mr. Block.

Mr. Feffer?

MR. FEFFER: Your Honor, I am going to respond just to the comments made with respect to my summation. Briefly, with respect to the press releases, your Honor's recollection, I believe is correct, that you told the jury on numerous occasions that any comment of defense counsel or the government was not to be considered as evidence and I believe that was stated by counsel as well during openings

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and during summations.

Secondly, there were a number of exhibits I specifically asked the jury to take into the jury room. I have not reviewed my summation for this purpose, your Honor, and I could be wrong, that the press releases were among the items that I suggested they could take in and examine.

In any case, they most definitely did take in each of the press releases and obviously for the purpose of studying this question put to them.

Finally, your Honor, I think it is noteworthy that Mr. Cohen doesn't make any reference to 31G, which of course is the press release wherein it is stated that Richard Packing had commitments for in excess of 200 Circus Wagon franchises.

With respect to money being inherited, it is my recollection ,and again I have to preface this by saying I havenot examined the record, but that Mr. Dudowitz did state Mr. Cohen's father passed away and he received some moeny, and then I was cut off from going further into that question.

Mr. Block also makes reference to Mr. Brodcorb's testimony and to the fact that certain accounting work papers reflect only three cancellations. Well, I suggest Mr. Block take a much more careful view of 13B-1, which are some yellow sheets that were introduced and if those are looked at very carefully it can quickly be seen that money that was given

to Richard Packing was quickly returned shortly thereafter in many more cases than just three.

Also of course he testified that Richard Packing would have had an operating loss but for the sale I believe in June of 1970 of the meat packing facilities.

With respect to the operations of Richard Packing and its Circus Wagon program, there was substantial testimony by both Mr. Kally and Mr. Ferris as to the condition of the franchise program.

In fact, on cross examination it was gone into in great length, I believe, by Mr. Segal as well as Mr. Block, as to the conditions of the franchising business at that time, how the economy was taking a down turn, how they were having problems raising money, how they ran into construction costs and I think Mr. Block's comment this morning are totally not substantiated by the record.

Finally, your Honor, with respect to the fact that the only allegations allegedly of fraud was that it went directly to the filing of the false offering circular in March of 1969 and that all of the mailings alleged supposedly were directly linked to thatoffering circular, I would direct Mr. Block's attention to count 3 in the indictment which clearly doesn't relate to the mailing of a false offering circular.

THE COURT: Thank you, Mr. Feffer.

MR. BLOCK: Your Honor, may I say something very briefly?

THE COURT: Yes.

MR. BLOCK: Your Honor --

THE COURT: When did I ever cut you off?

MR. BLOCK: I know. I appreciate it.

I have been reading the record, your Honor, and Mr. Feffer chastises me and I am basing what I say upon the record. Mr. Feffer was good enough to lend me, and I plan to return them today, this exhibit of Brodcorb's, and as I go through it I find that there were some returns of franchise money but they occurred subsequent to the April 16, 1970 date when this press release came out and I reread it and I don't like to misrepresent to the Court -- as I read it, that is my interpretation of this document and my rereading of Mr. Brodcorb's testimony as to whether or not there were cancellations right and left, and I say there were not.

With respect to Dudowitz, I recall that very clearly. Mr. Feffer asked Dudowitz did Mr. Cohen's father die, and when, and that was the end of the inquiry because we objected to anything further. We knew where he was going and so he was cut off and therefore there is no evidence that Cohen inherited any money with respect to the Dudowitz

testimony.

I stand on the other statements that I made, if your Honor please.

THE COURT: Thank you, Mr. Block.

Relative to the motions made this morning, the Court's view of the summation by Mr. Feffer was that taken as a whole, in the context of a lengthy trial, and in the context of what was said to the jury, the summation was not unfair or inflammatory to the extent that I feel a motion such as those which you made this morning would or should be granted.

There were objections made during the course of the government's counsel's summation and the Court on at least one and possible more occasions instructed the jury in a manner which I believe cured any possible objection.

I would go further to say that the jury by the nature and method of its deliberations went past the oratory to the essentials and called for items of evidence, had them sent into the jury room during the course of their deliberations, and I would think that was done by the jury for the purpose of determining what in fact was in the record so that the jury could reach a fair and just verdict.

The objections which were made by counsel during the course and at the end of the government's counsel's

summation were in this Court's view timely made and I ruled upon them at that time when I denied motions for a mistrial and in the totality of the situation I am not disposed to change my thinking that the defendant here did receive a fair trial and I also am of the view that the verdict accorded with the weight of the evidence, that the evidence of the guilt of the three defendants in this Court's view taking the oral testimony and the exhibits which were admitted into evidence that the evidence of the defendant's guilt was overwhelming, that the jury's verdict, finding the three defendants guilty as charged, was in accord with the evidence.

For these reasons, the defendant Cohen's motion for judgment of acquittal is denied.

The defendant Cohen's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure is also denied.

We will proceed now to the matter of sentence.

First, Mr. Cohen. The Court notes that Mr. Cohen and his counsel are present in court. I would ask Mr. Block, now that the Court has ruled upon your motions, if there is any reason why sentence should not be imposed at this time?

MR. BLOCK: Well, your Honor, there might well be, and it all depends on certain allegations in the Probation report which your Honor was kind enough to make available

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